Supreme Court, U.S.
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In The

Supreme Court of the United States

GREGORY LYNN NORWOOD,

Petitioner,

v.

STEVE J. VANCE; MIKE KNOWLES, WARDEN, CSP-SACRAMENTO; THOMAS P. GOUGHNOUR; CHERYL PLILER, FORMER WARDEN, CSP-SACRAMENTO; DAVID I. WILLEY; JAMES P. WALKER, ASSOCIATE WARDEN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, an inmate, alleges that prison officials deprived him of his right to outdoor exercise in violation of the Eighth Amendment. The jury concluded below that the prison officials imposed extended lockdowns on the general inmate population as punishment for inmate-on-staff assaults. The following questions are presented for review:

1. Whether the Ninth Circuit erred in requiring a jury instruction providing deference to prison officials' judgment in a general conditions of confinement case where the evidence showed the officials' decisions were deliberate and calculated, rather than in response to an immediate violent confrontation.

2. Whether the Ninth Circuit erred in granting the prison officials qualified immunity.

PARTIES INVOLVED

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BASIS FOR JURISDICTION IN THIS COURT

The court of appeals' order and amended opinion was entered on January 7, 2010. App. 1. A timely petitioner for rehearing was denied on January 7, 2010. App. 3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PRGVISION AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

29 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts

Petitioner Gregory L. Norwood is a California state prison inmate who was confined in Facility B of the California State Prison – Sacramento (hereinafter CSP-Sac), a maximum security prison. Prior to the incidents giving rise to the lawsuit, CSP-Sac was repeatedly described as a prison fraught with violence. However, incidents of violence did not always result in a partial or total lockdown of the inmate population.

During 2002 and 2003, CSP-Sac inmates were generally allowed daily outdoor exercises, unless certain unusual conditions prevented them from being able to do so. Prison officials usually initiated

lockdowns after a violent incident in order to immediately secure the prison and allow officers to investigate and identify the assailants. If a particular gang, ethnic or racial group was suspected to have caused the incident at issue, members of that specific group were often placed on lockdown until prison officials determine which particular members were involved. The stated goal of prison officials was to unlock the prison as swiftly and safely as possible so that inmates could return to regular programming.

Implementing lockdowns required regular and frequent meetings to determine how and when to unlock. Prison officials met as a management team and decided the appropriate action based on information gathered through an investigation. During the four lockdowns at issue, prison officials had bi-weekly meetings to determine whether unlocking the prison was feasible. The warden makes the final determination whether to continue a lockdown based on the information gathered.

During the two-year period at issue, violent incidents among inmates and between inmates and staff were rampant. For instance, in early 2002, two inmate-on-inmate stabbings occurred. In late 2002 and early 2003, gang and ethnic affiliated assaults also ensued, resulting in some very serious injuries. Following these incidents, prison administrators restricted access to the main yard only for the particular groups who were involved. On several occasions of inmate-on-inmate violence, the prison officials locked down Facility B without respect to gang affiliation.

However, these periods were brief, ranging from one day to one week before normal programs for uninvolved inmates resumed. By contrast, prison officials' response to inmate-on-staff assaults was markedly different, resulting instead in the four extended lockdowns at issue. As a result of these extended lockdowns, petitioner was confined in his cell and restricted from outdoor exercise for a total of three hundred and seventy days during the two-year span.

The first lockdown was initiated on January 4, 2002, after eleven Hispanic inmates attacked four officers, stabbing one of them in a dining hall. As a result, prison officials temporarily suspended all programming and recommended to the prison wardens that they uphold their decision to lockdown the prison. At the time the officials made the decision to impose a general lockdown, all of their information indicated that the assailants were Hispanic inmates. Nevertheless, the warden approved a lockdown for all inmates, which lasted for approximately eighty days. At no point during this period did the officers receive information that other groups were involved.

Subsequent violence between inmates persisted, yet no lockdown was initiated until May 8, 2002, when an African-American inmate stabbed an officer in a dining hall. Prison officials did not have information suggesting that this incident was related to the January 2002 incident or that other inmates were involved. Nevertheless, officials approved a general lockdown of the entire inmate population because they believed a threat *might* exist. It was not until

the end of the month that officers began restoring normal programs for certain groups. Petitioner and other African-American inmates were eventually allowed to exercise in groups of 20 on the mini-concrete yards by July 31, 2002. During the approximately eighty days petitioner was locked down and deprived of outdoor exercise, no one else was identified as being involved in the staff assault.

Officials initiated the third lockdown on December 28, 2002, when African-American Crips attacked an officer in the main yard. The prison officers did not initiate cell searches until eight days after the incident. The officers finally opened the mini-concrete yards to the African-American inmates for outdoor exercises 140 days after the staff assault.

On September 3, 2003, a Crip inmate slashed an officer and threw her down two flights of stairs, gravely injuring her. At the time of the assault, prison officials identified the inmate perpetrator and two other inmates suspected of being involved and immediately placed them in Administrative Segregation. The warden declared a state of emergency and locked down the entire facility. After over sixty days without outdoor exercise, officials concluded that the identified assailant had acted alone and petitioner was subsequently allowed to resume outdoor exercise on November 4th. Normal yard remained suspended for Crips, certain Caucasian inmates, and their cellmates, until December 3, 2003.

These four extended lockdowns resulted in the petitioner's confinement in his cell and restriction from outdoor exercise for a total of three hundred and seventy days in the two-year span.

B. Lower Court Opinions

A jury unanimously found that defendants violated petitioner's Eighth Amendment right to outdoor exercise and awarded petitioner $11 in nominal damages and $39,000 punitive damages. The district court entered judgment pursuant to the jury verdict. The defendants appealed, arguing that the district court erred by refusing to give the following jury instructions:

> In considering whether defendants were deliberately indifferent to the need for outdoor exercise, the jury should consider that defendants had a competing obligation under the Eighth Amendment to ensure the safety of prisoners, including protecting prisoners from each other. In considering these factors, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison.

The district court rejected the proposed instruction.

The Ninth Circuit Court of Appeals vacated the jury's verdict, holding that the district court erred in rejecting a deference instruction in a case alleging

that prison officials deprived petitioner of outdoor exercise during four extended lockdowns. The court also found that the officials were entitled to qualified immunity and reversed and rendered judgment for the defendants. Petitioner petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision is Erroneous Because it Required a Jury Instruction Providing Deference to Prison Officials' Judgment in a General Conditions of Confinement Case Where the Evidence Showed the Officials' Decisions were Deliberate and Calculated, Rather than in Response to an Immediate Violent Confrontation

This Court in *Farmer v. Brennan*, 511 U.S. 825 (1970) defined "deliberate indifference" and held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 844. To be liable, the officers must "both be aware of facts from which inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* Importantly, this Court noted that the deliberate indifference culpability standard is one that "incorporates due regard for prison officials' 'unenviable task of

keeping dangerous men in safe custody under humane conditions,'" implying that deference is a factor incorporated in the deliberate indifference analysis. *Id.* at 845.

The instruction the Court gave the jury was almost verbatim to the standard set forth in *Farmer*. The instruction provided that:

> To establish deliberate indifference plaintiff must prove defendant knew that plaintiff faced a substantial risk of serious harm to his health or safety and disregarded that risk by failing to take reasonable measures to correct it. Under the deliberate indifference standard, defendant must have been aware of facts from which the inference could be drawn that a substantial risk of serious harm to plaintiff's health or safety existed due to deprivation of outdoor exercise, and defendant must also have drawn that inference . . . A defendant who actually knew of a substantial risk of a serious harm to plaintiff's health or safety may be found free from liability if he responded reasonably to the risk, even if the harm was not ultimately averted.

App. 19-20.

While the respondents agreed to this part of the jury instruction, they sought the additional deference instruction that would have essentially directed a verdict in their favor.

In *Whitley v. Albers*, 475 U.S. 312 (1986), this Court established the applicable culpable state of mind for excessive force claims. *Whitley* involved a claim by an inmate who was shot during the prison officials' hasty and necessary attempts to quell a spontaneous prison riot. *Id.* at 314. This Court found that "where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.* at 320-21. This Court further decided that "when the 'ever-present potential for violent confrontation and conflagration' . . . ripens into actual unrest and conflict . . . [p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 321-22, citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

This Court's analysis in *Whitley* turned on the split-second, life-or-death decision makings of prison officials to secure the immediate safety of the prison. A high deferential standard is warranted in excessive force cases because in such cases, prison officials must make quick decisions "without the luxury of a second chance." *Id.* at 320. However, this Court has never

extended the *Whitley* excessive force standard to a deliberate indifference case challenging prison conditions – specifically, the prison officials' deliberate and calculated decisions of depriving inmates of outdoor exercises for extended periods.

The Ninth Circuit reasoned that because *Farmer* cited *Bell v. Wolfish*'s deference language, such language was necessary to "alert the jury that the deliberate indifference standard 'incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions.'" App. 1-9, citing *Farmer*, 511 U.S. at 845. However, as Judge Thomas in dissent properly noted, the majority failed to acknowledge that by citing *Bell*, this Court in *Farmer* implied that "the principle of deference to the judgment of prison officials undergirds the standard." App. 24-25. This Court should clarify that the deference language surrounding its announcement of the applicable standards in *Whitley* and *Farmer* should not be confused with the standards themselves. App. 25.

In addition, the *Bell* deference is not without limits. Significantly, this Court instructed that deference must be given unless there is "substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations." *Bell*, 441 U.S. at 548. In awarding punitive damages to petitioner, the jury may have found that the prison officials' decision to implement long periods of lockdowns and deny outdoor exercises over a two-year period was an exaggerated response to the

circumstances surrounding the decisions for the extended lockdowns.

Further, importing such deference instruction in conditions of confinement deliberate indifference cases conflicts with this Court's decision in *Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, this Court rejected the applicability of the deferential standard of review in the Eighth Amendment context announced in *Turner v. Shafley*, 482 U.S. 78 (1987). *Johnson*, 543 U.S. at 511. Specifically, this Court noted that "we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard rather than *Turner*'s 'reasonably related' standard." *Id.* This Court reasoned that "this is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Id.*, citing *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979). This Court cited Justice Kennedy's opinion in *Spain v. Procunier* in reaffirming that "the full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. . . . Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary." *Id.*, quoting *Spain*, 600 F.2d at 194. Consequently, importing the proposed deference language in a case in which prison officials implemented extended

lockdowns for periods longer than necessary to suppress violence and ensure prison safety would have invited the type of "mechanical deference" that this Court has previously disavowed. *See* App. 26.

Notably, this was a jury case and no other court has ever used the requested deference instruction in a *Farmer* general conditions of confinement case. The deference language articulated in *Bell* is appropriate to remind courts of their proper role in protecting the government's interest in efficient operation of its prisons. *Bell*, 441 U.S. at 547-48, 557 n.38. Once the case goes to the jury, however, this reminder tilts the scales too far on the side of prison officials. As Judge Thomas's dissent aptly noted, "not every general legal principle 'lifted from the case law' is properly provided as instruction to the jury." App. 27. Doing so would risk jury confusion and conflict with this Court's precedent.

II. The Ninth Circuit Erred in Granting the Prison Officials Qualified Immunity

The court ignored well-established precedent which calls the court to construe evidence in favor of the prevailing party when the defense of qualified immunity is pressed after a jury verdict, as it was in the present case. *Iacobucci v. Boulter*, 193 F.3d 14, 23 (1st Cir. 1999). This Court should reach down to correct the Ninth Circuit's application of de novo review in order to protect present and future parties from a standard of review that indulges bias.

Even if this Court chooses not to review the Ninth Circuit's failure to grant deference to the jury's findings on the issue of qualified immunity, the Ninth Circuit nonetheless failed to properly apply the de novo standard of review to the issue of qualified immunity. De novo review requires the decision-maker to consider "all the evidence that came before the jury at trial." *Haley v. Gross*, 86 F.3d 630, 633 (7th Cir. 1996). The majority disregarded all facts in the record that supported petitioner's claim for relief.

The Ninth Circuit ignored well-established precedent which requires the court to construe evidence in favor of the prevailing party when the defense of qualified immunity is pressed after a jury verdict, as it was in the present case. *Iacobucci*, 193 F.3d at 23. This led the Ninth Circuit to an improper characterization of the qualified immunity issue, and to an erroneous grant of the defense to the defendants below.

A. The Ninth Circuit Failed to Properly Apply the De Novo Standard of Review for the Defense of Qualified Immunity

The Ninth Circuit failed to consider all the evidence in the record when conducting its de novo review on the issue of qualified immunity. The majority stated that petitioner "offered no evidence that the lockdowns were meant to be punitive or were otherwise implemented in bad faith." App. 13. This statement cannot be reconciled with the record.

The majority claims that the defendants had "substantial reasons for imposing the lockdowns: They were attempting to restore order during a series of brutal attacks, some lethal or nearly so." *Id.* However, the majority does not explain why the prison officials did not impose extensive lockdowns in the case of inmate-on-inmate attacks, which the evidence demonstrated were also prevalent during the relevant time period. This error is highlighted by the majority's own pronouncement that "prison officials have a duty to keep inmates safe, and in particular to protect them from each other." *Id.*

The jury heard evidence that prison officials carried out this duty after inmate-on-inmate attacks by imposing lockdowns on selected groups rather than on the entire inmate population, and for a period of just a few days. When the attacks targeted prison staff, the lockdowns stretched on for months. As the officials did not explain why inmate-on-staff attacks necessitated such lengthy deprivations of outdoor exercise in comparison to inmate-on-inmate attacks, the jury properly inferred that the officials systematically utilized extended lockdowns as a punitive measure when inmates attacked prison staff.

If the Ninth Circuit had conducted a proper de novo review, the conclusion drawn by the jury, that the lockdowns occurred for inmate-on-staff assaults as a punitive measure, is inescapable. The majority suggests that respondents acted reasonably when they decided to continue lockdowns, given the occurrence of violence. However, on cross-examination, the

defendants conceded that "those types of incidents occur even when there is no lockdown," with the same frequency, and that "the violence is pretty steady." *Id.* 40. Former Warden Pliler conceded that pressure amongst races and gang members was common during normal programming, and that "that's the nature of the prisoner at the prison." *Id.* at 39.

The record evidence included numerous memoranda from prison officials to staff and inmates that the usual procedure after a violent incident was to lockdown just those inmates closely identified with the attacker. For example, if an inmate-attacker belonged to the Crip gang, other Crip gang members would also be locked down. The evidence demonstrated that this procedure was ignored after inmate-on-staff assaults, when general lockdowns were imposed.

With regard to the first attack on staff, petitioner tendered evidence that staff "believed it was likely that the Southern Hispanics had put a hit out on staff" and that Southern Hispanic and black inmates were generally unlikely to form alliances. *Id.* at 38-39, n.7. In the attack that precipitated the second lockdown, a lone Crip member attacked a staff member in the dining hall. The jury heard testimony from the prison officials that they "never even received anonymous information that a group, or any specific inmate was involved in these plots to assault staff other than the perpetrators" who were identified on the day of the first two attacks. *Id.* at 38. Despite overwhelming evidence to the contrary, the majority

claims that general lockdowns after staff assaults, but only brief and group-specific lockdowns after inmate assaults, "does not show malicious intent or deliberate indifference." *Id.* at 38-39.

In its purported de novo review, the Ninth Circuit disregarded the evidence indicating that prison officials conducted extensive general lockdowns as a retaliatory response to inmate-on-staff assaults. The jury, after hearing the evidence, rejected respondents' justifications for imposing punitive lockdowns that deprived plaintiff of his constitutional right to outdoor exercise for months at a time.

B. The Ninth Circuit Failed to Construe the Evidence In the Light Most Favorable to the Petitioner

The Ninth Circuit also ignored the well-established rule that when the defense of qualified immunity is raised after the jury verdict, as it was in the present case, the evidence must be construed "in the light most favorable to the party that prevailed at trial." In such a situation, the circuits have overwhelmingly held that "deference should be accorded to the jury's discernible resolution of disputed factual issues." *Iacobucci*, 193 F.3d at 23. *See also Jennings v. Jones*, 499 F.3d 2, 7 (1st Cir. 2007); *Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997); *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996); *Karnes v. Skrutski*, 62 F.3d 485, 494 (3d Cir. 1995); *Posr v. Doherty*, 944 F.2d 91, 95-96 (2d Cir. 1991).

In *Pearson v. Callahan*, 129 S. Ct. 808 (2009), this Court held that qualified immunity protects government officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 815 (2009), citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

As the trial judge properly instructed the jury, and respondents conceded in their pretrial statement, the complete denial of outdoor exercise for up to four and one-half months satisfies the objective prong of the *Farmer* deliberate indifference test. There is no dispute from respondents that deprivations of outdoor exercise of this length constitute objectively serious deprivations of Eighth Amendment rights. The jury found that respondents did not act with mere deliberate indifference, but rather, they acted with reckless disregard for it. App. 37. Clearly, if the evidence is viewed in a light most favorable to petitioner, it does not support a defense of qualified immunity.

The Ninth Circuit failed to properly weigh the evidence in a light most favorable to petitioner when evaluating the defense of qualified immunity. The majority concluded that petitioner did not offer any evidence that the prison officials acted in bad faith. *Id.* at 36. However, at trial, the jury granted petitioner punitive damages because the evidence so strongly indicated that the prison officials acted in bad faith. In order to grant punitive damages, the jury had to find that "the defendants were not merely deliberately

indifferent to Norwood's health posed by the deprivation of outdoor exercise, but that defendant's conduct was 'malicious, or in reckless disregard of plaintiff's rights.'" *Id.* at 37. The jury determined that petitioner was entitled to punitive damages after a full presentation of evidence.

III. The Ninth Circuit Impermissibly Narrowed Petitioner's Constitutional Right to Outdoor Exercise

The majority improperly indulged every inference in favor of the defense in its purported de novo review of the qualified immunity defense, which led the Ninth Circuit to mischaracterize the qualified immunity issue in this case. The majority framed the issue narrowly, stating that defendants are entitled to qualified immunity "so long as a right to outdoor exercise *in the midst of severe ongoing prison violence* was not clearly established at the time defendants acted" App. 12. (emphasis added). A more accurate characterization of the issue as the jury viewed the evidence would have been whether the defendants were entitled to qualified immunity where prisoners are deprived of their Eighth Amendment right to outdoor exercise where extended lockdowns are imposed as punishment on the general prison population after inmate attacks on staff.

The Ninth Circuit majority ignored thirty years of the court's own precedent, concluding that factual differences of the prior prisoner outdoor exercise cases

made them inapplicable to the present case. However, this Court stated in *Hope v. Pelzer*, 536 U.S. 730, 731 (2002) that for purposes of qualified immunity, officials can still be on notice that their conduct violates established law, even in novel factual circumstances. *Hope* holds that official action may be protected by qualified immunity not just when the "very action in question has previously been held unlawful; but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.* at 739. This Court looked to the criminal statutes, 18 U.S.C. § 241 and § 242, which make it a crime for a state official to act "willfully" and under color of law to deprive a person of rights protected by the Constitution. *Id.* In *United States v. Lanier*, 520 U.S. 259 (1997), this Court held that despite "notable factual distinctions" between the precedents and the cases then before this Court, it would affirm § 241 and § 242 convictions so long as the prior decisions gave "reasonable warning that the conduct then at issue violated constitutional rights." *Hope*, 536 U.S. at 740. This Court in *Lanier* explained that the "fair warning" requirement is identical under § 242 and the qualified immunity standard in civil cases. *Id.*

Judge Thomas in dissent provided ample case law supporting the proposition that respondents were reasonably warned that their deprivations of petitioner's right to outdoor exercise amounted to a violation of clearly established law. In *Allen v. Sakai*, 40 F.3d 1001 (9th Cir. 1994), the Ninth Circuit noted that "several circuits, including this one, had held

that deprivation of outdoor exercise could constitute cruel and unusual punishment" *Id.* at 1004. The Ninth Circuit recognized in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), that "some form of regular outdoor exercise is extremely important to psychological and physical well being of the inmates" *Id.* at 199. In *Spain*, the court found a violation of the Eighth Amendment where inmates were held in continuous segregation for a period of years without access to outdoor exercise. With similar facts, the Ninth Circuit in *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984), held that where inmates were held in segregation without access to outdoor exercise, "the district court did not err in concluding that the denial of outside exercise raised a substantial constitutional question and that plaintiffs would probably succeed on the merits of that issue" *Id.* at 1493. In *Allen*, the Ninth Circuit held that prison officials were not entitled to summary judgment on grounds of qualified immunity where the plaintiff prisoner was provided only 45 minutes of exercise per week during a six-week period. *Allen*, 40 F.3d at 1004. The court stated that "it should have been apparent to defendants that they were required to provide regular outdoor exercise to [the plaintiff] unless 'inclement weather, unusual circumstances, or disciplinary needs made that impossible.'" *Id.* at 1004, citing *Spain*, 600 F.2d at 199.

The Ninth Circuit in the present case ignored the weight of case law and did not follow the "reasonable warning" guideline set by this Court in *Hope*. The majority misconstrued the facts and glossed over

evidence probative of the prison official's violations of established law. Under the Ninth Circuit's current construction as represented by the majority opinion, a prisoner's right to outdoor exercise has been reduced to virtually nothing. Prison officials may take away these rights from the general inmate population for months at a time as punishment for inmate on staff violence.

By including the qualification "in the midst of severe ongoing prison violence" in its characterization of the qualified immunity issue, the Ninth Circuit ran afoul of this Court's guidance from *Hope v. Pelzer*. Moreover, in phrasing the issue in this manner, the Ninth Circuit ignored the jury's evaluation of the evidence, that the lockdowns and their associated deprivation of exercise, were imposed as punishment. Because the right to exercise was clearly established, the Ninth Circuit erred in granting qualified immunity to defendants.

CONCLUSION

The petition for a writ of certiorari should be granted. This court may also wish to consider summary reversal of the judgment below.

Respectfully submitted,

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Dated: April 7, 2010

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY LYNN NORWOOD,

Plaintiff-Appellee,

v.

STEVE J. VANCE; MIKE KNOWLES, Warden, CSP-Sacramento; THOMAS P. GOUGHNOUR; MICHAEL F. MARTEL; DAVID I. WILLEY; CHERYL PLILER, Former Warden at CSP; JAMES P. WALKER, Associate Warden,

Defendants-Appellants.

No. 07-17322

D.C. No. CV-03-02554-GEB/GGH

GREGORY LYNN NORWOOD,

Plaintiff-Appellee,

v.

STEVE J. VANCE; MIKE KNOWLES, Warden, CSP-Sacramento; THOMAS P. GOUGHNOUR; JAMES P. WALKER, Associate Warden; DAVID I. WILLEY; CHERYL PLILER, Former Warden at CSP,

Defendants-Appellants,

and

MICHAEL F. MARTEL,

Defendant.

No. 08-15778

D.C. No. 2:03-CV-02554-GEB-GGH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
October 29, 2008 – Sacramento California

Filed July 9, 2009
Amended January 7, 2010

Before: Alex Kozinski, Chief Judge, Sidney R. Thomas and Consuelo M. Callahan, Circuit Judges.

Opinion by Chief Judge Kozinski;
Dissent by Judge Thomas

COUNSEL

Carter White, Supervising Attorney, and Erin Haney, Certified Law Student, U.C. Davis School of Law, King Hall Civil Rights Clinic, Davis, California, for the plaintiff-appellee.

Christopher J. Becker, Esquire, Jim Sobolewski, James Flynn, Deputy Attorneys General, Office of the California Attorney General, Sacramento, California, for the defendants-appellants.

ORDER

The opinion is amended as follows:

Page 629, column 1, line 26	Add a footnote after "Defendants appeal." stating: "Only an Eighth Amendment outdoor exercise claim is before

	us on this appeal. We therefore express no view as to the race-based aspect of the lockdowns or any potential Equal Protection claim."
Page 632, column 2, lines 36-37	Replace "constitution" with "Eighth Amendment"
Page 633, column 1, line 35	Replace "lawful" with "consistent with the Eighth Amendment"

Appellee's Petition for Panel Rehearing and Rehearing en banc is otherwise denied. *See* Fed. R. App. P. 35, 40. Judge Thomas would grant the petition.

No further petitions for rehearing or rehearing en banc may be filed.

OPINION

KOZINSKI, Chief Judge:

We consider when prison officials may be held liable for depriving inmates of outdoor exercise.

Facts

Gregory Norwood was incarcerated at CSP-Sacramento, a maximum security prison, during a particularly violent period in the prison's history. Norwood brought this section 1983 action alleging that prison officials violated the Eighth Amendment

when they denied him outdoor exercise during four separate extended lockdowns over the course of two years.

The prison initiated these lockdowns after serious inmate assaults on staff. During the lockdowns, inmates were confined to their cells and normal programs were suspended while officials investigated the violence. Based on what they learned, officials gradually eased restrictions on specific gangs, ethnic and racial groups, restoring outdoor exercise sooner for inmates who they believed would pose less risk of further violence. Norwood was not a gang member, but gang members often pressured unaffiliated inmates of the same race or ethnicity to assist them. Prison officials therefore believed that limiting the scope of lockdowns to gang members would be inadequate to ensure safety.

During this two-year period, there were also numerous inmate-on-inmate attacks. Officials did not always initiate total lockdowns after such attacks. According to one defendant, the prison's response to inmate-on-inmate violence "[d]epends on the circumstances of the assault. . . . [I]f it's fisticuffs, and it's a one-on-one situation, no, we wouldn't lock down for that. If it's a slashing assault, or a stomping, or multiple inmates involved in a melee, then yes, we would lock down. . . ."

Officials initiated the first lockdown in early 2002 after eleven Hispanic inmates attacked four correctional officers, nearly killing one of them.

Prison officials didn't know if the attack was planned or isolated. They also didn't know, and were never able to ascertain, who provided the weapons. The weeks following the attack brought a series of inmate-on-inmate attacks, including a homicide, as well as another attempted murder of an officer. Officials eventually decided it was safe to begin restoring normal programs, beginning with "critical workers." Norwood was in the second group of workers to resume outdoor exercise. His exercise had been suspended for about three months.

In early May, a black inmate stabbed an officer in a dining hall. Officials initiated a second lockdown but began restoring normal programs by the end of the month. By mid-July, prisoners other than blacks had resumed outdoor exercise. Even so, attacks on officers occurred during this lockdown, including a battery and an attempted battery. Norwood, who is black, was denied exercise for three months.

In the waning days of 2002, black inmates attempted to murder a correctional officer, and a number of black Crips attacked staff members. Officials initiated a third lockdown, during the course of which inmates committed four batteries or attempted batteries of officers and five batteries or attempted murders of inmates. During this lockdown, Norwood's outdoor exercise was suspended for four and a half months.

In September of 2003, a black Crip attempted to murder an officer. Because of the seriousness of the

incident and the fact that it was the fourth major assault on staff in a 19-month period, officers locked down all inmates and declared a state of emergency. Officers eventually determined that the attacker had acted alone and began restoring outdoor exercise. But the violence continued. Certain white inmates, and those celled with them, were locked down because of an attempted murder of an inmate in November, and certain Crips and their cellmates remained on lockdown from earlier violence. Norwood was denied outdoor exercise for two months.

A jury found that defendants violated Norwood's Eighth Amendment right to outdoor exercise but concluded that Norwood suffered no harm and thus awarded no compensatory damages. The jury did award $11 in nominal damages and $39,000 in punitive damages. The district court awarded $23,875.55 in attorney's fees. Defendants appeal.[1]

Analysis

I

Defendants claim the district court erred by refusing to give the following jury instruction:

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[1] Only an Eighth Amendment outdoor exercise claim is before us on this appeal. We therefore express no view as to the race-based aspect of the lockdowns or any potential Equal Protection claim.

> In considering whether defendants were deliberately indifferent to the need for outdoor exercise, the jury should consider that defendants had a competing obligation under the Eighth Amendment to ensure the safety of prisoners, including protecting prisoners from each other. In considering these factors, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison.

The district court initially agreed to the language but, after plaintiff objected, declined to include it on the ground that "deference" was "undefined." Because defendants challenge the resulting jury instruction as an incomplete, and therefore incorrect, statement of the law our review is de novo. *Clem v. Lomeli,* No. 07-16764, slip op. at 6572 (9th Cir. June 2, 2009); *Dang v. Cross,* 422 F.3d 800, 804-06 (9th Cir. 2005).

Plaintiff argues that defendants failed to preserve their objection below. *See* Fed. R. Civ. P. 51(d)(2). But the record shows that defendants contested the district court's decision not to include the proposed language and made the grounds for their position clear, citing relevant authority. An "objection need not be formal," and defendants' proffered language was "sufficiently specific to bring into focus the precise nature of the alleged error." *Inv. Serv. Co. v. Allied Equities Corp.,* 519 F.2d 508, 510 (9th Cir. 1975). Nor did the district judge's vague statement that defendants "may" have an opportunity to change his mind

counter the overall impression that raising the issue again via formal objection would be both "unavailing" and a "pointless formality." *Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993).

It is well established that judges and juries must defer to prison officials' expert judgments. In *Bell v. Wolfish,* the Supreme Court explained:

> [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security.

441 U.S. 520, 547 (1979). Six years later, the Court spelled out that deference requires "that neither judge *nor jury* freely substitute their judgment for that of officials who have made a considered choice." *Whitley v. Albers,* 475 U.S. 312, 322 (1986) (emphasis added). The Court confirmed that *Bell* remains good law in *Farmer v. Brennan,* its seminal opinion on challenges to conditions of confinement, which twice cited *Bell* with approval. 511 U.S. 825, 845, 847 (1994).

The district court declined to give the proposed instruction because the meaning of deference would not be "clear to a lay person." But "deference" is not Urdu or Klingon; it is a common English word. *See,*

e.g., Michael Crichton, *Airframe* 78 (1996) ("[S]he certainly knew where all the bodies were buried. Within the company, she was treated with a deference bordering on fear."). It may be true that deference has varied meanings, Dissent at 454 n.4, but so do most English words. If the district judge believed the term needed further context or definition, he could have provided it.

Perfect or not, the defendants' proposed instruction brought the issue of deference to the district court's attention. "[T]he fact that the proposed instruction was misleading does not alone permit the district judge to summarily refuse to give any instruction on the topic." *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017 (9th Cir. 2007). The district court omitted the instruction altogether, rather than modifying it to correct the perceived deficiency. The remaining instructions failed to alert the jury that the deliberate indifference standard "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 511 U.S. at 845 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979)). The dissent apparently believes that, because *Farmer* "incorporates" *Bell* deference, the use of language drawn from *Farmer* was adequate to instruct the jury. Dissent at 452. But juries are not clairvoyant and will not know to defer unless they are told to do so.

We have long recognized that additional instruction regarding deference is required in cases applying

Whitley to allegedly excessive force by prison officials. *See* Ninth Circuit Manual of Model Jury Instructions § 9.24 (2007 ed.). The dissent accuses us of improperly extending the *Whitley* regime to a case involving conditions of confinement. Dissent at 451. But defendants' proposed instruction was not drawn from *Whitley;* it was drawn from *Bell* – itself a conditions of confinement case. *Bell,* 441 U.S. at 534, 547. Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement. *See Whitley,* 475 U.S. at 322; *Farmer,* 511 U.S. at 845. Indeed, conditions of confinement and use of force are often flip sides of the same coin: A more restrictive confinement may diminish the need for force and vice versa.

As the government recognized at trial, the court's instruction correctly stated *Farmer*'s deliberate indifference standard. But the court's failure to give additional guidance on deference rendered the instruction incomplete and misleading. And the error was also prejudicial. If properly instructed, the jurors might well have reached a different conclusion. Norwood has not met his burden of showing the verdict would "more probably than not" have been the same absent the error. *Clem,* slip op. at 6575. We therefore vacate the jury's verdict and damages awards.

II

We would normally remand for a new trial, but as defendants are entitled to qualified immunity that

is not necessary here. Our dissenting colleague may be right that defendants waived the immunity claim by failing to raise it to the district court during or immediately after trial. On appeal, however, Norwood failed to argue waiver; rather, he addressed qualified immunity on the merits while arguing waiver of the two other principal issues in the case. In *Tortu v. Las Vegas Metropolitan Police Department,* 556 F.3d 1075 (9th Cir. 2009), cited by the dissent, *see* Dissent at 456, plaintiff explicitly argued that defendants had forfeited qualified immunity by failing to make the proper motion below. *Tortu,* 556 F.3d at 1081.

It is "well-established" that a party can "'waive waiver' implicitly by failing to assert it." *Tokatly v. Ashcroft,* 371 F.3d 613, 618 (9th Cir. 2004); *United States v. Garcia-Lopez,* 309 F.3d 1121, 1123 (9th Cir. 2002); *see also Wilson v. Kelkhoff,* 86 F.3d 1438, 1445 (7th Cir. 1996) (plaintiff waived defendant's waiver of absolute immunity defense). Norwood waived the defendants' waiver by addressing the claim on the merits without also making a waiver argument. *Cf. Chicano Educ. & Manpower Servs. v. U.S. Dep't of Labor,* 909 F.2d 1320, 1327-28 & n.5 (9th Cir. 1990) ("Yes, we are indeed holding that the Department has waived its right to argue that CEMS waived its right to ask for a waiver. . . ."). The dissent would have us raise the issue of waiver sua sponte and suggests that we have "discretion" not to reach defendants' qualified immunity claim. Dissent at 457-58. But "[t]his court will not address waiver if not raised by the opposing party." *United States v. Doe,* 53 F.3d

1081, 1082-83 (9th Cir. 1995) (quoting *United States v. Schlesinger,* 49 F.3d 483, 485 (9th Cir. 1995)). Even if we had such discretion, we believe the more prudent course is to resolve the case on the basis of the issues actually briefed and argued by the parties.

When a party waives waiver, we proceed directly to the merits. *See, e.g., Tokatly,* 371 F.3d at 618-24; *Doe,* 53 F.3d at 1083-84; *Wilson,* 86 F.3d at 1445-46. We do not, as the dissent suggests, Dissent at 458-59, engage in plain error review. Defendants are entitled to qualified immunity so long as a right to outdoor exercise in the midst of severe ongoing prison violence was not clearly established at the time defendants acted. *See Saucier v. Katz,* 533 U.S. 194, 201-02 (2001). "The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Id.* at 202 (emphasis added).

Three factors weigh heavily in our analysis: First, as *Saucier* explains, the qualified immunity inquiry is highly context-sensitive, turning on whether it would be clear to a reasonable officer that denying outdoor exercise was unlawful "in the situation he confronted." *Id.* The extraordinary violence gripping the prison threatened staff and inmates alike, and there was a serious risk that gangs would press unaffiliated inmates like Norwood into service. *See* pp. 436-38 *supra.* While Norwood argues that a reasonable officer would have known that denying outdoor exercise in the midst of ongoing prison violence violated his rights, he cites just one case

Allen v. Sakai, 48 F.3d 1082 (9th Cir. 1995) – for the general proposition that the Ninth Circuit "is one of many [courts] that have held that there is a constitutional right to outdoor exercise for inmates."

But *Allen* does not hold that a prisoner's right to outdoor exercise is absolute and indefeasible, or that it trumps all other considerations. Plaintiffs in *Allen* survived summary judgment because prison officials there relied on "inconsequential logistical concerns" to justify denying outdoor exercise. *Id.* at 1088. Defendants here had substantial reasons for imposing the lockdowns: They were attempting to restore order during a series of brutal attacks, some lethal or nearly so. They did not place "inconsequential logistical concerns" above Norwood's need for outdoor exercise. And plaintiff offered no evidence that the lockdowns were meant to be punitive or were otherwise implemented in bad faith.

Second, prison officials have a duty to keep inmates safe, and in particular to protect them from each other. *Farmer*, 511 U.S. at 832-33; *LeMaire v. Maass*, 12 F.3d 1444, 1462 (9th Cir. 1993). Officials must balance this imperative against other obligations that our laws impose, such as providing outdoor exercise. When violence rises to unusually high levels, prison officials can reasonably believe it is lawful to temporarily restrict outdoor exercise to help bring the violence under control. We've explained that "prison officials have a right and a duty to take the necessary steps to reestablish order in a prison when such order is lost. This is for the benefit of the

prisoners as much as for the benefit of the prison officials." *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir. 1982). Here, at least one prisoner had died; others (prisoners and guards) had been severely wounded. Defendants had to act decisively to stop the violence.

The dissent claims that the "jury reasonably rejected defendants' argument that unusual levels of violence justified the long-term deprivations in this case" because "defendants conceded on cross-examination that 'those types of [violent] incidents occur even when there is no lockdown,' with the same frequency, and that 'the violence is pretty steady.'" Dissent at 463-64 (emphasis omitted). But there's more to the former warden's testimony:

> While we were on lockdown status, these types of things continued to happen. *Either as we incrementally unlocked and released to the small yards for exercise, or sent – you know, releasing – lifting the privileges to go to meals or whatever, violence continued to happen.* And if that violence was – occurred based on a decision that we made that we felt it was safe, and we let the small group of prisoners out and something happened, then we would call back our prior decision. [Emphasis added.]

What we understand the warden to be saying is that the lockdowns *were* effective at curbing violence, and that violence resumed as privileges were restored.

Such decisions are not to be judged with the benefit of hindsight, in any event. It matters not whether the measures taken actually worked but whether prison officials reasonably believed they would be effective in stopping the violence. At most, prison officials here may be faulted for erring on the side of caution by maintaining lockdowns for longer than necessary. But, when it comes to matters of life and death, erring on the side of caution is a virtue. Certainly, no officer could reasonably have anticipated that such prudence would be found to violate the Eighth Amendment.

Third, when balancing the obligation to provide for inmate and staff safety against the duty to accord inmates the rights and privileges to which they are entitled, prison officials are afforded "wide-ranging deference." *Bell,* 441 U.S. at 547. When a "lockdown was in response to a genuine emergency," and "restrictions were eased as the prison administration determined that the emergency permitted," we may not lightly second-guess officials' expert judgments about when exercise and other programs could safely be restored. "These decisions are delicate ones, and those charged with them must be given reasonable leeway." *Hayward v. Procunier,* 629 F.2d 599, 603 (9th Cir. 1980).

It would be particularly odd to hold that liability attaches in this case, where hindsight validates defendants' decisions. The record makes clear that a great deal of violence took place during outdoor exercise. While denying outdoor exercise for extended

periods carried some risk of harm, officials' judgment that there was a greater risk of harm from allowing outdoor exercise was certainly reasonable. Indeed, Norwood suffered no injuries from attacks by other inmates or from being denied outdoor exercise – a fact the jury recognized by awarding no compensatory damages. Norwood might have fared less well had prison officials been less cautious. Although exercise is "one of the basic human necessities protected by the Eighth Amendment," *LeMaire*, 12 F.3d at 1457, "a temporary denial of outdoor exercise with no medical effects is not a substantial deprivation." *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997).

We therefore conclude that a reasonable officer could have believed that restricting Norwood's outdoor exercise was consistent with the Eighth Amendment. Certainly, no authority clearly established the contrary. *Allen* didn't. *See* p.443 *supra*. And *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), concerned inmates in disciplinary segregation who were denied outdoor exercise as a normal condition of their confinement, *id.* at 199-200, rather than for safety during emergencies. Not surprisingly, our district courts have found an absence of Eighth Amendment liability on facts similar to these. *See, e.g., Jones v. Garcia*, 430 F. Supp. 2d 1095, 1102-03 (S.D. Cal. 2006) (finding no Eighth Amendment violation where prisoner was denied outdoor exercise for ten months – double the longest single period that Norwood's exercise was restricted – because of ongoing violence); *Hayes v. Garcia*, 461 F. Supp. 2d 1198, 1201, 1207-08

(S.D. Cal. 2006) (same for nine-month denial of outdoor exercise); *Hurd v. Garcia*, 454 F. Supp. 2d 1032, 1042-45 (S.D. Cal. 2006) (same for five-month denial).

Norwood argues that defendants had no need to conduct lengthy lockdown investigations because those investigations either found that the initial assaults were isolated incidents or else could not determine who else was involved. Norwood also argues that defendants could have limited exercise restrictions to specific groups of prisoners. But the investigations were reasonable precautions, and defendants had no way of knowing beforehand what they would yield. That defendants imposed general lockdowns after some attacks on staff but only group-specific restrictions after some attacks on inmates does not show malicious intent or deliberate indifference. Attacks on staff are, by their nature, more serious challenges to prison authority than attacks on other inmates.

We decline Norwood's invitation to micro-manage officials whose expertise in prison administration far exceeds our own, and we conclude that defendants are entitled to qualified immunity. On remand, the district court shall enter judgment consistent with this opinion.

Because plaintiff is no longer the prevailing party, we vacate the award of attorney's fees.

REVERSED.

THOMAS, Circuit Judge, dissenting:

There is no reason on this record to disturb the jury verdict. The district court correctly analyzed the law and properly instructed the jury consistent with our precedent. The jury considered all of the evidence and rejected the government's theory that defendants were not deliberately indifferent because security concerns justified the ongoing deprivations. Substantial evidence supports the jury verdict.

I would not reach the question of qualified immunity because the government did not preserve the issue for appeal. Assuming for argument's sake that it was proper for us to entertain the defense, I would hold that the defendants were not entitled to qualified immunity. Clearly established law precludes prison officials from depriving inmates of outdoor exercise for extended periods absent exigent circumstances. The jury's finding that defendants acted with reckless disregard to the risk to Norwood's health and safety leaves no room to conclude defendants could reasonably have believed their actions lawful.

For these reasons, I must respectfully dissent.

I

We afford trial judges "substantial latitude in tailoring jury instructions." *Mockler v. Multnomah County,* 140 F.3d 808, 812 (9th Cir. 1998) (citation omitted). Here, there is no doubt that the district court properly instructed the jury on the essential

elements of the claim at issue. Indeed, the government concedes that the jury was properly instructed, and it did not object to the instruction given by the district court. What the government sought was an additional, misleading instruction that would have engrafted supplemental requirements onto those dictated by precedent. The district court found that the new instruction was unclear, undefined, and used language that would be confusing to a lay jury. A district court does not commit error in rejecting a misleading supplementary instruction that is at odds with a controlling instruction everyone agrees was properly given. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Id.* (citation omitted).

This case involved a challenge to prison conditions – specifically, the long-term deprivation of outdoor exercise – to which the deliberate indifference standard applies. The jury was instructed that:

> To establish deliberate indifference plaintiff must prove defendant knew that plaintiff faced a substantial risk of serious harm to his health or safety and disregarded that risk by failing to take reasonable measures to correct it. Under the deliberate indifference standard, defendant must have been aware of facts from which the inference could be drawn that a substantial risk of serious harm to plaintiff's health or safety existed due to deprivation of outdoor exercise, and

> defendant must also have drawn that inference.

The jury was further instructed that "[a] defendant who actually knew of a substantial risk of a serious harm to plaintiff's health or safety may be found free from liability if he responded reasonably to the risk, even if the harm was not ultimately averted." These instructions set forth – almost verbatim – the deliberate indifference culpability standard for cases involving challenges to prison conditions announced by the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994). *See id.* at 837 ("We hold . . . that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."); *id.* at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted."). In combination with the instruction that exercise did not have to be provided if "inclement weather, unusual circumstances, or disciplinary needs makes that impossible," the instructions conveyed to the jury that it could not find defendants liable if the officials knew of the risk posed by continuing the lockdowns without providing

for exercise, but responded reasonably to that risk under the circumstances.

The government agreed that the jury instruction that "exercise must be provided unless inclement weather, unusual circumstances, or disciplinary needs makes that impossible" was "an adequate and proper statement of the law." *See Allen v. Sakai*, 40 F.3d 1001, 1004 (1994) (stating that prison officials were required to "provide regular outdoor exercise to [the plaintiff] unless 'inclement weather, unusual circumstances, or disciplinary needs made that impossible'") (quoting *Spain v. Procunier*, 600 F.2d 189, 199 (1979) (Kennedy, J.)).

What the government sought was an additional instruction that amounted to a command to direct a verdict in favor of the government:

> In considering whether defendants were deliberately indifferent to the need for outdoor exercise, the jury should consider that defendants had a competing obligation under the Eighth Amendment to ensure the safety of prisoners, including protecting prisoners from each other. In considering these factors, you should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and maintain internal stability in a prison.

The district court rejected the proffered jury instruction because he found the deference language unclear and undefined, noting that "one of my jobs as a judge

is to provide the jury with an understandable instruction, something that's clear to a lay person."

One cannot fault the district court's analysis.[1] The proposed instruction deviates from the Supreme Court's formulation of the standard of deliberate indifference in *Farmer,* and the district court rightly concluded it might be confusing to a lay jury.

The language sought by the government not only departed from the proper and time-tested definition of deliberate indifference, but also would have imported language that the Supreme Court has held is not proper for such cases. The deference language requested by defendants appears verbatim in the model Ninth Circuit jury instruction for prisoner *excessive force* claims, in which the heightened subjective culpability standard set forth in *Whitley v. Albers,* 475 U.S. 312, 321-22 (1986), applies.[2] *See*

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[1] Indeed, by providing instructions defining deliberate indifference in *Farmer*'s terms, rather than using the current version of the Ninth Circuit Model Jury Instruction, the trial judge actually avoided error on another front. *See Clem v. Lomeli,* No. 07-16764, slip op. at 6574-75 (9th Cir. June 2, 2009) (holding that district court erred in providing current Ninth Circuit Model Jury Instruction 9.25 because the instruction deviates from *Farmer,* which does not require "direct causation by affirmative action" of prison officials); *id.* at 6577 (emphasizing that current Ninth Circuit Model Jury Instruction 9.25 does not adequately state the law because it never "mentions or defines the term 'deliberate indifference' ") (Hug, J., concurring).

[2] It is questionable whether this deference language is even properly included in jury instructions for excessive force cases. *See* Catherine T. Struve, *Constitutional Decision Rules for*

(Continued on following page)

Ninth Circuit Manual of Model Jury Instructions § 9.24 (2007 ed.).

However, the *Whitley* excessive force standard, under which prison officials may be held liable only if they act "maliciously or sadistically for the very purpose of causing harm," *Whitley,* 475 U.S. at 321-22 (citation omitted), does not apply to claims challenging prison conditions. Indeed, our precedent forecloses such an application, and defendants do not argue otherwise. In *Johnson v. Lewis,* 217 F.3d 726 (2000), we held that where prisoners were held handcuffed and prone in a prison yard for four days after a riot, the heightened culpability standard announced in *Whitley* applied to the prison officials' actions *up to the point* when the inmates were secured, but that once the prison officials "were no longer required to make split-second, life-and-death decisions," the *deliberate indifference* standard applied. *Id.* at 734; *see also Jordan v. Gardner,* 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (*Whitley*'s "maliciously or sadistically" standard applies "in the context of a prison-wide disturbance or individual confrontation between an officer and prisoner," when "corrections officers must act *immediately* and emphatically to defuse a potentially explosive situation") (emphasis added). As we explained in *Jordan,* the

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Juries, 37 COLUM. HUM. RTS. L. REV. 659, 679 (2006) (arguing that including deference language in excessive force jury instruction double counts the deference due prison officials because the *Whitley* standard already incorporates deference).

excessive force test involves the examination of "the exercise of judgment of a particular officer on a specific occasion," while the deliberate indifference test generally involves "polic[ies] . . . developed over time, with ample opportunity for reflection." *Jordan*, 986 F.2d at 1528.

The language that the government proposed in this case would have effectively imposed the more deferential standard we held inapplicable in *Johnson* and *Jordan*. The standards for excessive force claims are not coextensive with the standards applicable to prison conditions claims. In my view, not only was the trial judge justified in rejecting the instruction, the judge would have committed error if he had given it.

Defendants contend that the deliberate indifference standard "did not capture the importance of deferring to the expert judgment of prison officials concerning when outdoor exercise could safely be resumed." However, contrary to defendants' assertion, the deliberate indifference standard announced in *Farmer* and adopted by the trial judge in his instructions is a "standard that *incorporates* due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 511 U.S. at 845 (emphasis added) (citing *Spain*, 600 F.2d at 193). The Supreme Court in *Farmer* also cited its decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), in support of the iteration of the deliberate indifference standard it adopted, indicating that the principle of deference to the judgment of prison officials undergirds the

standard.[3] *See id.* It is a mistake to confuse the deference language surrounding the Supreme Court's announcement of the applicable standards in *Whitley* and *Farmer* with the standards themselves. *See* Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 COLUM. HUM. RTS. L. REV. 659, 679 (2006) (noting that deference language in *Whitley* "explain[s] the Court's choice of decision rule, but need not be seen as a part of that decision rule").

An instruction incorporating *further* deference would run afoul of the Supreme Court's rejection of such an approach in *Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, the Court expressly disavowed the applicability in the Eighth Amendment context of the standard articulated in *Turner v. Safley*, 482 U.S. 78, 89 (1987), namely that a "regulation is valid if it is reasonably related to legitimate penological interests." The Court reasoned that "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment."

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[3] The majority argues that the requested instruction was required because its language was drawn from *Bell*, a case that involved a challenge to conditions of confinement, albeit in the pretrial detention context. However, *Bell* preceded the line of Supreme Court cases setting forth the current standards applicable to prison conditions cases – including the deliberate indifference standard. The deliberate indifference standard incorporates the level of deference the Court has deemed warranted in the context of challenges to prison conditions under the Eighth Amendment, as opposed to challenges to prison policies and practices under generally applicable constitutional provisions.

Johnson, 543 U.S. at 511. In support of this assertion, the Court quoted with approval the following passage from Justice Kennedy's decision for this Court in *Spain*:

> [T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes. . . . Mechanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary.

Id. (quoting *Spain*, 600 F.2d at 194). Inclusion of the requested deference instruction, in light of the fact that the appropriate level of deference was already incorporated in the culpability standard, would have invited exactly the sort of "mechanical deference" the Supreme Court has rejected.

Further, *Farmer* suggests that it is *judges* at whom the deference language in the *Bell* line of cases is directed, and *judges* who must be mindful of the respective competencies of the judiciary and executive branches. *See Farmer*, 511 U.S. at 846-47 (noting that district courts should approach grant of injunctive relief in prison conditions cases with caution lest they become "enmeshed in the minutiae of prison operations") (quoting *Bell*, 441 U.S. at 562). *Farmer* does not suggest that this complex balancing of competing institutional interests should be placed directly in the hands of jurors. *See Struve, supra*, at 681-82 (arguing

that not all judicial decision rules are appropriate for use as decision rules for juries). While juries, as part of the judicial branch, no doubt have an indirect role to play in this balancing process, they properly play this role by applying the standards the Supreme Court has determined strike the appropriate balance. The district court in this case accurately instructed the jury on those standards. In doing so, the district court in this case wisely recognized that not every general legal principle "lifted from the case law" is properly provided as instruction to the jury. The court correctly concluded that to give the government's double deference instruction would have been confusing to a lay jury.[4]

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[4] The majority criticizes the trial judge on this point, contending that deference is a commonly understood lay term, and could not have been confusing. However, its citation of language in the novel *Airframe* illustrates the problem. Instructing a jury to give prison officials deference, if deference commonly "borders on fear," is not a correct application of the law and would have amounted to directing a verdict in favor of the government. Even in our sterile legal environment, deference comes in varietals, such as *Chevron* deference, *Skidmore* deference, and sardonic deference. *See, e.g., Massiah v. United States,* 377 U.S. 201, 208 (1964) (White, J., dissenting) ("With all due deference, I am not at all convinced that the additional barriers to the pursuit of truth which the Court today erects rest on anything like the solid foundations which decisions of this gravity should require."). And, of course, there is more than one breed of institutional deference relevant to this case. *See, e.g., McCord v. Maguire,* 873 F.2d 1271, 1274 (9th Cir. 1989) (correctly noting that we must be "mindful of the deference due the verdict of a jury") (citation omitted). Here, the trial judge quite rightly concluded that to give an instruction that mixed legal

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Because the relevant level of deference is already incorporated into the content of the culpability standards governing the conduct of prison officials, the district court correctly rejected the instruction. The requested instruction misstated applicable law and, as the district court properly concluded, would have been confusing to the jury. Moreover, everyone agrees that the primary instruction given by the judge on this issue was entirely proper. The trial judge properly rejected the defendants' proffered "deference" instruction, in favor of an instruction that everyone agrees correctly stated the applicable law.[5]

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standards and, in effect, told the jury to layer deference upon deference, was not appropriate – particularly when the judge had already given an entirely proper instruction on the topic. (I must, however, acknowledge that the majority is quite correct in intuiting that, unsurprisingly, there is no Klingon word for "deference." *See generally* Marc Okrand, THE KLINGON DICTIONARY (Star Trek 1992)).

[5] Although I have elected to discuss this issue on the merits, there is considerable force to the plaintiff's argument that the government failed to preserve the question for appeal. Under Fed. R. Civ. P. 51(d)(1)(B), a party may assign as error "a failure to give an instruction, if that party properly requested it and – unless the court rejected the request in a definitive ruling on the record – also properly objected." (emphasis added). As I have noted, at the conference at which the instructions were discussed, the trial judge indicated that he found the government's proposed instruction confusing and indicated that he was not inclined to give it. However, he also stated, "at this juncture, you may have an opportunity to show me that I'm wrong later, I think the plaintiff's position is correct." At the critical moment in the trial, when the judge asked for objections to the instructions as given, the government stated that it "will

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II

The government did not preserve its qualified immunity defense for appeal. The rules for preserving a qualified immunity defense are straightforward. Qualified immunity is an affirmative defense that must be pleaded in the answer. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). However, "defendants may raise an affirmative defense for the first time in a motion for summary judgment . . . if the delay does not prejudice the plaintiff." *Magana v. Commonwealth of N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997).

If the district court denies qualified immunity on a summary judgment motion, the order is immediately appealable as a collateral order if the judgment is made as a matter of law and "the issue appealed concerns whether the facts demonstrated a violation of clearly established law." *Rodis v. City and County of San Francisco*, 558 F.3d 964, 968 (9th Cir. 2009) (citation omitted). If the district court denies summary judgment on qualified immunity because there remain genuine issues of material fact, then there is no right of interlocutory appeal, because such an order is not a "final, immediately appealable order." *Maropulos v. County of Los Angeles*, 560 F.3d

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not object to any of the instructions" except to "renew the defendants' request for failure to mitigate." The government did not, at the critical juncture when formal objections were to be made, request that the court give the additional deference instruction.

974, 975 (9th Cir. 2009) (per curiam); *see also KRL v. Estate of Moore*, 512 F.3d 1184, 1188-89 (9th Cir. 2008) ("Our jurisdiction is limited to questions of law, and does not extend to qualified immunity claims involving disputed issues of material fact.").

If the district court denies qualified immunity because there are genuine issues of material fact, then the case proceeds to trial. "When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant's responsibility to preserve the legal issue for determination after the jury resolves the factual conflict." *Tortu v. Las Vegas Metro. Police Dep't.*, 556 F.3d 1075, 1083 (9th Cir. 2009). To preserve the issue of qualified immunity, the defendants must make a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a). *Id.* The Rule 50(a) motion must be filed "at any time before the case is submitted to the jury." *Id.* at 1081. A party may also renew the motion for judgment as a matter of law based on qualified immunity after trial under Fed. R. Civ. P. 50(b). However, a "failure to file a Rule 50(a) motion precludes consideration of a Rule 50(b) motion for judgment as a matter of law." *Id.* at 1083. Filing a motion for summary judgment or raising the issue in pre-trial submissions is not sufficient to avoid a waiver. *Id.* at 1082.

Here, defendants raised qualified immunity as an affirmative defense and moved for summary judgment. The district court denied summary judgment because there were genuine issues of material fact. In their pretrial statement, defendants acknowledged

that their motion for qualified immunity had been denied based on the existence of material factual disputes and stated that their "entitlement to qualified immunity at trial will depend on what evidence is produced to the court for determination of this issue."

The case proceeded to trial. Defendants did not request that the judge give any instructions to the jury pertinent to the immunity defense. Defendants did not file a Rule 50(a) motion for judgment as a matter of law before the case was submitted to the jury. Nor did defendants file a renewed motion for judgment as a matter of law pursuant to Rule 50(b) after the verdict was rendered. In fact, after a jury was seated, the issue of qualified immunity was never mentioned again in the district court. At oral argument, defendants conceded that they provided the district court no opportunity to rule on the question whether, on the facts established at trial, they were entitled to qualified immunity. Defendants offered no argument or explanation as to why the issue should not be deemed forfeited. Plainly, defendants did not preserve their post-trial assertion of qualified immunity for appeal. *Under Tortu*, the government has forfeited its qualified immunity defense, and we should not consider it for the first time on appeal.

The majority quite rightly notes that the plaintiff did not raise the issue of waiver in its appellate briefing, which was a serious omission. That omission places the question of whether to entertain the

government's belated qualified immunity argument within our sound discretion. I would not choose to exercise such discretion.[6] By entertaining an appeal based on a defense abandoned at trial, we impose on trial judges the untenable duty of *sua sponte* re-examining a jury verdict in light of abandoned defenses. The Rules set forth the procedure for raising legal challenges to jury verdicts: making a motion for judgment as a matter of law. The requirement is critical not only to the structure of the adversary system, but to our appellate system in

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[6] We have never held that we must reach the merits of an immunity defense abandoned by the government below when the plaintiff fails to argue waiver in the briefs. While the majority cites several of our cases for the proposition that the Court does not address waiver if not raised by the opposing party, none of these cases involved a party's failure to raise properly a defense to liability in the trial court. *See Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004) (government waived argument that petitioner had waived argument before the immigration judge); *United States v. Garcia-Lopez*, 309 F.3d 1121, 1123 (9th Cir. 2002) (government expressly waived argument that defendant had waived his right to appeal as part of plea agreement); *United States v. Doe*, 53 F.3d 1081, 1082-83 (9th Cir. 1995) (where government urged court at oral argument to decide issue on merits, argument that defendant had waived challenge to sentence by not raising it on direct appeal was waived); *United States v. Lewis*, 787 F.2d 1318, 1323 n.6 (9th Cir. 1986) (court declined to address government's argument, raised for the first time in petition for rehearing, that defendant had waived instructional error argument in trial court). Because deciding in the first instance the applicability of an abandoned defense to liability after a general jury verdict implicates concerns not present in these cases, I would not extend the "waiver of waiver" principle to this new context.

which the trial court considers legal arguments in the first instance. There are, of course, exceptions to this general rule and, from time to time, we have indulged new legal arguments for the first time on appeal. However, I would not make an exception in this case with the effect of imposing a new duty on the trial court *sua sponte* to consider abandoned defenses after the jury has issued its verdict.

III

Assuming that the question of qualified immunity is properly before us, I would hold under the circumstances presented here that a reasonable officer could not have believed the exercise deprivations in this case were lawful. Because the government did not preserve the issue for appeal, we review the claim under the familiar plain error standard. To prevail on plain error review, the government must show (1) that the proceedings below involved error, (2) that the error is plain, and (3) that the error affected the substantial rights of the aggrieved party. *United States v. Olano,* 507 U.S. 725, 732-35 (1993). In addition, the government must also show that the alleged error – here, the trial judge's failure, after the evidence was presented, *sua sponte* to enter judgment as a matter of law for defendants based on qualified immunity – "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' before we will exercise our discretion pursuant to Rule 52(b) to correct the plain error." *United States v. Alferahin,*

433 F.3d 1148, 1154 (9th Cir. 2006) (en banc) (internal quotation marks omitted).

To prevail on his Eighth Amendment prison conditions claim, Norwood had to establish that he was subjected to an objectively serious deprivation and that prison officials were deliberately indifferent to his health or safety. *Farmer,* 511 U.S. at 834; *Wilson v. Seiter,* 501 U.S. 294, 303 (1991). As the trial judge correctly instructed the jury, and defendants conceded in their pretrial statement, the complete denial of outdoor exercise for periods of up to four and one-half months satisfies the objective prong of the *Farmer* test. Indeed, it was clearly established at the time of the lockdowns involved in this case that the complete deprivation of outdoor exercise for periods of two to four and one-half months constituted an objectively serious deprivation for purposes of the Eighth Amendment.

Thirty years ago, we recognized that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Spain v. Procunier,* 600 F.2d 189, 199 (9th Cir. 1979). In *Spain,* we held that inmates classified as dangerous due to violent acts in prison and confined to a disciplinary unit were entitled to regular outdoor exercise. Subsequent cases in our circuit clearly establish that the denial of outside exercise for extended periods "is a sufficiently serious deprivation and thus meets the requisite harm necessary to satisfy *Wilson*'s objective test." *LeMaire v. Maass,* 12 F.3d 1444, 1457 (9th Cir. 1993). In *LeMaire* we noted

that "this circuit has determined that the long-term denial of *outside* exercise is unconstitutional" but found no violation where a prisoner had both "abused [his outdoor exercise privileges] and represent[ed] a grave security risk when outside his cell." *Id.* at 1458. Shortly after *LeMaire,* in *Allen v. Sakai,* 40 F.3d 1001 (9th Cir. 1994), we held that prison officials were not entitled to summary judgment on grounds of qualified immunity where the plaintiff prisoner was provided only 45 minutes of exercise per week during a six-week period. We stated that in light of our prior cases, "it should have been apparent to defendants that they were required to provide regular outdoor exercise to [the plaintiff] unless 'inclement weather, unusual circumstances, or disciplinary needs made that impossible.'" *Id.* at 1004 (citing *Spain,* 600 F.2d at 199). And, while we noted in *May v. Baldwin,* 109 F.3d 557 (9th Cir. 1997), that "a temporary denial of exercise with no medical effects is not a substantial deprivation," *id.* at 565, *May* involved the denial of exercise for only 21 days as opposed to the four deprivations of two to four-and-one-half months in this case, totaling more than a year out of a period of less than two years.

We have held that in cases of genuine emergency, the *temporary* deprivation of outdoor exercise may not violate the Eighth Amendment. In *Hayward v. Procunier,* 629 F.2d 599 (9th Cir. 1980), we upheld a district court's grant of summary judgment to prison officials but specifically noted that the lockdown was "temporary and plaintiffs . . . were allowed

approximately the minimum exercise mandated in *Spain* within a month after the imposition of the lockdown." *Id.* at 603. We premised our holding on the fact that the district court had "carefully reviewed the restrictions of the lockdown in light of the emergency at the prison and determined that they did not cross the eighth amendment line." *Id.* Similarly, in *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982), after noting that "when a genuine emergency exists, prison officials may be more restrictive than they otherwise may be, and certain services may be suspended *temporarily*," *id.* at 1259 (emphasis added), we remanded to the district court to consider "the length of time each restriction was in effect, and whether the restriction and its duration bore a relationship to legitimate attempts to ease the emergency." *Id.*

In this case, the magistrate judge denied summary judgment for defendants on the grounds that there were genuine issues of fact regarding whether an emergency necessitated the months-long complete deprivations of outdoor exercise in this case. The magistrate judge also found a genuine issue of fact existed as to whether during these periods other arrangements for outdoor exercise were feasible – for example, in small groups on the smaller concrete yards. Finally, the magistrate judge found disputed facts regarding defendants' representation that an extended lockdown depriving *all* inmates of physical exercise was called for where violence was precipitated by identifiable groups. In short, the magistrate

judge found that these factual issues – material to both the deliberate indifference and qualified immunity inquiries – were disputed. The precise circumstances surrounding the continuation of the four lockdowns without any arrangements for outdoor exercise were deemed issues of fact for trial.

The case proceeded to trial before a jury, and the jury heard testimony from defendants describing the circumstances surrounding the decisions to continue the total lockdowns, the feasibility of providing outdoor exercise in smaller groups on the mini-yards, and the officers' opinions as to the harmfulness of exercise deprivation. After hearing all the evidence, the jury found that the defendants had been deliberately indifferent in failing to provide Norwood access to outdoor exercise during each of the four lockdown periods. Furthermore, the jury determined that Norwood was entitled to punitive damages. To do so, the jury had to find that the defendants were not merely deliberately indifferent to the risk to Norwood's health posed by the deprivation of outdoor exercise, but that defendants' conduct was "malicious, or in reckless disregard of plaintiff's rights."

In determining whether the facts established entitle defendants to qualified immunity, "the party that prevailed at trial is entitled to have the evidence construed in a light most favorable to it, and the question is whether the evidence was so one-sided that one party would have to prevail as a matter of law." *Thompson v. Mahre*, 110 F.3d 716, 721 (9th Cir. 1997) (citing *Air-Sea Forwarders, Inc. v. Air Asia Co.*,

880 F.2d 176, 181 (9th Cir. 1989)); *see also Jennings v. Jones*, 499 F.3d 2, 7 (1st Cir. 2007) (holding that where defendants press qualified immunity after a general jury verdict, the court is required to view facts relevant to qualified immunity determination "in the light most favorable to the verdict"). Here, the jury found defendants acted not merely with deliberate indifference to Norwood's right to outdoor exercise, but with *reckless disregard* for it. The evidence viewed in light of that finding does not support a defense of qualified immunity, which requires that defendants reasonably believed their conduct to be lawful.

The government relies on a number of factual claims that were disputed at trial, and which the verdict indicates the jury rejected. For example, the government asserts that after the lockdowns, the officials gradually eased restrictions "based on what they learned." In fact, the jury heard testimony from prison officials that they "never even received anonymous information that a group, or any specific . . . inmate was involved in these plots to assault staff other than the perpetrators" who were identified on the day of the first two attacks. The jury also heard evidence that contradicted prison officials' statements that they did not know if other inmates, including inmates of other races, were responsible for the first attack.[7] Finally, with regard to the attack

[7] With regard to the first attack on staff by Hispanic inmates, Norwood tendered evidence that staff "believed it was

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precipitating the fourth lockdown, Norwood tendered evidence that prison officials knew shortly after – and perhaps before – the attack that the lone perpetrator, a Crip gang member, had specifically targeted the staff member who was attacked and was *already* on lockdown status at the time of the attack because prison staff had information that Crip inmates were going to assault someone in the facility.

Similarly, the government notes that Norwood, who was not affiliated with any prison gangs, was locked down after the attacks instigated by known gang members because "gang members often pressured unaffiliated inmates of the same ethnicity to assist them." However, Norwood tendered evidence – in the form of numerous memoranda from prison officials to staff and inmates – that the usual course of action after a violent incident was to lock down those inmates closely identified with the group to which the attacker belonged, for example, Crip inmates in the case of an incident involving Crips. Furthermore, Defendant Pliler conceded that pressuring and violence among races and gangs occur during normal programming and that "[t]hat's the nature of the prisoner at the prison."

The majority claims that the fact that defendants imposed general lockdowns after attacks on staff but

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likely that the Southern Hispanics had put a hit out on staff" and that, generally speaking, Southern Hispanic and black inmates were unlikely to form alliances.

only group specific restrictions after attacks on inmates "does not show malicious intent or deliberate indifference." The majority also states that "plaintiff offered no evidence that the lockdowns were meant to be punitive or were otherwise implemented in bad faith." However, the jury thought otherwise, rejecting the defendants' testimony that the exercise deprivations were motivated primarily by the officials' concerns for safety and security.

Finally, the majority suggests that defendants reasonably decided to continue the lockdowns given the occurrence of violent incidents during and after lockdown periods. However, defendants conceded on cross-examination that "those types of incidents occur even when there is no lockdown" *with the same frequency,* and that "the violence is pretty steady." Thus, the jury reasonably rejected defendants' argument that they believed the unusual levels of violence justified the long-term deprivations in this case. Indeed, defendants' argument that the circumstances here were "unusual" and excused the exercise deprivation is belied by the length of the lockdowns, which persisted for periods totaling over one year out of a twenty-two month period.

In sum, the evidence as to the necessity of the long-term exercise deprivations at issue in this case, viewed in light of the jury verdict for Norwood, does not provide a sufficient basis for determining, as a matter of law, that defendants were entitled to qualified immunity. The alleged error of the trial judge in failing *sua sponte* to grant qualified

immunity certainly does not rise to the level of plain error. The district court did not commit error – much less a plain error – and it would be hard to imagine a trial court decision less likely to "seriously affect the fairness, integrity or public reputation of judicial proceedings" than a decision not to give a jury instruction that the trial judge determined would be confusing to the jury. Thus, if I were to reach the merits of the qualified immunity defense, I would affirm the judgment of the district court.

IV

The district court correctly applied the law and instructed the jury according to controlling precedent. The jury, after hearing a full evidentiary presentation, rejected the defendants' justification. The government failed to preserve the defense of qualified immunity for appeal. Indeed, the government did not even mention the affirmative defense after the jury was seated, much less make the appropriate motion to present the question to the district court for its consideration. The district court did not commit error, much less plain error, in not *sua sponte* granting judgment as a matter of law after trial based on an abandoned affirmative defense. There is no justification for overturning the jury's verdict.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY LYNN NORWOOD,

Plaintiff,

vs.

EDWARD ALAMEIDA, JR., et al.,

Defendants.

/

No. CIV S-03-2554 GEB GGH P

FINDINGS AND RECOMMENDATIONS

(Filed Mar. 5, 2007)

Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is defendants' March 23, 2006, motion for summary judgment; plaintiff filed opposition[1] to the motion on May 12, 2006.[2] By *Order,* filed on

[1] Plaintiff's opposition has been put together in a wholly haphazard fashion. It consists of almost 700 pages, much of it wholly unnecessary and almost all of it hopelessly disorganized. For example, and to no apparent purpose, plaintiff includes defendants' motion for summary judgment as part of his opposition. He includes, inter alia, many duplicative pages of exhibits, an earlier motion to compel, a litany of defendants' discovery responses, without identifying in his opposition the basis for their submission. In his opposition to the defendants' undisputed facts, plaintiff does not identify or cite to the exhibits upon which he seeks to rely to counter defendants' evidence. Plaintiff has placed an undue burden on this court in making it so difficult to navigate his filing.

[2] Per the mailbox rule, the opposition was filed on May 9, 2006.

September 21, 2006, the court, inter alia, granted plaintiff's motion pursuant to Fed. R. Civ. P. 56(f) only to the extent of allowing plaintiff to file a supplemental response within 30 days of service upon him of defendant Vance's supplemented response to a specific interrogatory, therein set forth, in plaintiff's first set of interrogatories propounded upon Vance. Defendants filed notice of having re-served the supplemented response on September 27, 2006. Plaintiff has not filed a supplement to his opposition and the time for doing so has long since expired. Even though the time for doing so had passed, on February 26, 2007, plaintiff expressly informing [sic] the court that he did not intend to file any supplemental opposition. Therefore, the court proceeds to adjudicate the defendants' dispositive motion.

Second Amended Complaint

This matter, originally filed on December 15, 2003, proceeds on the verified second amended complaint, filed on June 7, 2005, naming as defendants two former California State Prison – Sacramento (CSP-Sac) wardens Cheryl Pliler and Mike Knowles; two former CSP-Sac B-Facility captains, Steve J. Vance and David Willey; and three former associate wardens of CSP-Sac B-Facility: Michael F. Martel; Thomas P. Goughnour; and James P. Walker. Plaintiff alleges that during four lockdown periods, he was deprived of outdoor exercise causing him physical and psychological injury, including stress, anxiety, depression, headaches and muscle cramps. He and other

inmates on lockdown were confined to a double-bunk cell 24 hours a day seven days a week with the exception of a five-minute shower period every other day, excluding Sundays. He alleges that the extended lockdown periods without permitting outdoor physical exercise constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Second Amended Complaint (SAC), pp. 2-4.

Black general population inmates were denied outdoor exercise for fourteen of the 22 months from January 4, 2002, until November 4, 2003, arising from no individual misconduct or propensity to escape. SAC, p. 4. The first period lockdown period at issue began on January 4, 2002, and concluded on April 3, 2002, and was instituted because of an alleged staff stabbing purportedly by Mexican inmates in CSP-Sac dining hall two. Memoranda rescinding outdoor exercise were passed out to inmates and were signed by defendant CSP-Sac B-Facility Captain Vance, at which time plaintiff suffered anxiety, depression, stress, headaches and muscle cramps. Defendant Warden Plyler [sic] not only had to have approved the excessive deprivation of outdoor exercise but did nothing to intervene to prevent the suffering and deprivation caused over the thirteen-week period. SAC, p. 5, Exhibit (Ex.) A.[3]

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[3] The exhibits to which plaintiff refers are attached to the first amended complaint, of which the court takes judicial notice. (Judicial notice may be taken of court records. *Valerio v. Boise*

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The second lockdown period occurred from May 8, 2002, until July 31, 2002. This lockdown occurred because of an alleged staff stabbing assault involving a single black inmate who attacked his work supervisor. Defendants Vance and Assoc. Warden Goughnour signed memoranda rescinding outdoor physical exercise until July 31, 2002. Defendant Pliler, at a minimum, implicitly approved the extended (thirteen-week) period of exercise deprivation and failed to intervene to prevent plaintiff's suffering, causing the plaintiff to suffer and endure the conditions previously noted. SAC, p. 5, Ex. B.

The third period of outdoor exercise deprivation occurred during a lockdown which began on December 28, 2002, and ended on June 1, 2003. This lockdown was precipitated by a melee in the B-Facility's main yard wherein staff was allegedly stabbed. Defendant Vance and Assoc. Warden Martel signed various memoranda depriving plaintiff of outdoor physical exercise for a twenty-week period. Defendant Pliler, as warden, had to have approved the deprivation and, in any event, failed to intervene on plaintiff's behalf to stop his suffering from headaches, stress, anxiety, depression and muscle cramps, as a result of not being allowed outdoor exercise for an extended period. SAC, p. 6, Ex. C.

Cascade Corp., 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981)).

The fourth outdoor exercise period ran from September 3, 2003, until November 4, 2003, during which plaintiff suffered the stress, anxiety, depression, headaches and muscle cramps which he claims to have suffered during each lockdown period described herein as a result of the lack of outdoor exercise. This more than eight-week lockdown (eight weeks, six days) occurred as a result of a staff stabbing assault in CSP-SAC B-Facility housing block four. Memoranda rescinding outdoor exercise were passed out to plaintiff and the other inmates that were signed by defendant CSP-SAC B-Facility Captain D. Willey and defendant B-Facility Assoc. Warden James P. Walker. Defendant Warden Mike Knowles is responsible for having approved, or otherwise permitted, the rescission of exercise and for not having intervened to keep plaintiff from suffering. SAC, p. 6, Ex. D.

Plaintiff states that CSP-SAC has three facilities, A, B, & C, with each having eight individual housing units; all are Level 4, one eighty (180) designed. All cells are the same size with the same showers and dayroom design. Each facility's housing unit has a mini concrete yard, along with a main exercise yard. Inmates in Administrative Segregation (Ad Seg) have access to the mini-concrete yard ten days (mandatory) after placement in Ad Seg. Plaintiff alleges that Ad Seg inmates after ten days are allowed mini concrete yard access that general population (GP) inmates are deprived of for months at a time. Plaintiff contends that GP inmates should be allowed access to these

mini yards after the facility search during the investigative stages. SAC, p. 7.

Plaintiff contends that the four stabbing assaults were isolated and/or spontaneous, that the deprivation of outdoor exercise was punitive and retaliatory, rather than based on safety or security concerns; that investigations of stabbing assaults involving staff take months, while the entire facility, when incidents other than staff assaults are implicated, can and have been searched in a matter of days. SAC, p. 8, Exs. E, F & G. Only staff assaults are deemed serious. Analysis of the need for a lockdown should be based on whether an assault was spontaneous and isolated and whether a continued threat exists in the GP, not needlessly prolonged ostensibly for security reasons, but in actuality as a form of punishment and retaliation. SAC, p. 9.

Plaintiff seeks both injunctive relief and money damages.[4]

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[4] Even with the broadest construction of plaintiff's allegations, which the court grants, in consideration of both the liberal pleading rules of federal courts and plaintiff's pro se status, plaintiff simply has not framed any colorable Fourteenth Amendment equal protection claim. Plaintiff's claims center wholly on allegations of violations of his rights under the Eighth Amendment.

Motion for Summary Judgment

Defendants move for summary judgment on the grounds that: 1) the undisputed facts show defendants did not act maliciously or sadistically, or with deliberate indifference, in violation of plaintiff rights under the Eighth Amendment, that is, a) the lockdown(s) were properly imposed and maintained for staff and inmate safety and security, and b) there were no feasible exercise alternatives during the lockdown(s); and 2) each defendant is entitled to qualified immunity because a reasonable person in each defendant's position could have believed his or her conduct was lawful. Notice of Motion for Summary Judgment (NMSJ), p. 1, MSJ Memorandum (hereafter, MSJ), p. 2.

Legal Standard for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Fed. R. Civ. P. 56(c) is met. "The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact, and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to

> interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct., 2548, 2553 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322, 106 S. Ct. at 2552. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323, 106 S. Ct. at 2553.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). In attempting to establish the existence of this factual dispute, the opposing

party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See* Fed. R. Civ. P. 56(e); *Matsushita,* 475 U.S. at 586 n.11, 106 S. Ct. at 1356 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *see Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.,* 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita,* 475 U.S. at 587, 106 S. Ct. at 1356 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. *See Anderson,* 477 U.S. at 255, 106 S. Ct. at 2513. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. *See Matsushita,* 475 U.S. at 587, 106 S. Ct. at 1356. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines,* 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff'd,* 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita,* 475 U.S. at 587, 106 S. Ct. 1356 (citation omitted).

On October 27, 2004, and again on October 6, 2005, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland,* 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied,* 527 U.S. 1035, 119 S. Ct. 2392 (1999), and *Klingele v. Eikenberry,* 849 F.2d 409, 411-12 (9th Cir. 1988).

Injunctive Relief Claims Mooted

The court observes that plaintiff filed a notice of change of address to Tehachapi on June 26, 2006. This prison transfer occurred after this motion for summary judgment was submitted, so the motion does not include as a ground that plaintiff's requests for injunctive relief have now been mooted. Nevertheless, the court sua sponte finds that when an inmate seeks injunctive relief concerning an institution at which he is no longer incarcerated, his claims for such relief become moot. *See Sample v. Borg*, 870 F.2d 563 (9th Cir. 1989); *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). *See also Reimers v. Oregon*, 863 F.2d 630, 632 (9th Cir. 1988). Plaintiff has demonstrated no reasonable possibility that he will be incarcerated at CSP-Sac at any predictable time in the future. Accordingly, judgment should be entered for defendants as to the claims for injunctive relief plaintiff makes in this case.

Undisputed and Disputed Facts

Plaintiff attempts to take issue with a majority of defendants' undisputed facts; however, unless he provides some evidentiary basis for an objection to a fact for which defendants provide evidentiary support, the objection will be noted but found to be without merit and the fact at issue will be deemed undisputed.

On March 1, 1995, plaintiff, Gregory Lynn Norwood, was sentenced to a term of life without the

possibility of parole in state prison following convictions for first degree murder (Cal. Pen. Code § 187(a)) and second degree robbery (Cal. Pen. Code § 211). At all times relevant to this action, plaintiff, a black inmate, was incarcerated at the California State Prison in Sacramento (CSP-Sac) in Facility B. DUF # 1. Plaintiff asserts that he is classified as a nonaffiliated inmate, and the court has been able to locate among his filings a copy of a 1998 classification committee report for plaintiff which includes in the report "Gangs: None." Opposition (Opp.), Ex. C, Ex. 14, p. 3. Plaintiff includes an exhibit which states that in 6/9/95, when he was received at CSP-Sac, he was placed in Ad Seg and remained there pending a review because his central file showed him to be a member of the Black Gorilla Family Prison Gang. Opp., Ex. 12, p. 1. In July, 1995, plaintiff received a CDC-128 B chrono which states that after a June, 1995 review, it was found that there was insufficient information in his file to indicate "any prison gang or disruptive group activities." Opp., Ex. 12, p. 2. Plaintiff apparently indicated in an interview at the time that he associated with a Crips gang on the streets but not in prison. *Id.* However, none of this disputes the fact that plaintiff was a black inmate incarcerated at CSP-Sac during the times at issue in this action, which fact remains undisputed.

At all times relevant to this action, defendants were employed by the California Department of Corrections and Rehabilitation (CDCR) at CSP-Sac. Cheryl Pliler was the Warden of CSP-Sac from July

1998 to October 2003; Michael Knowles was the Warden of CSP-Sac beginning in October 2003; Steve Vance was the Captain of Facility B from September 2001 to September 2003; David Willey was the Acting Facility B Captain, from September 2, 2003 to September 19, 2003, and from October 14, 2003 to January 16, 2004; James Walker was the Acting Facility B Associate Warden, in September 2003; Thomas Goughnour was the Facility B Associate Warden during the May 2002 lockdown; and Michael Martel was the Facility B Associate Warden beginning in March 2003. DUF # 2.

Since its creation, CSP-Sac has been a Level IV prison – a maximum security prison – because the inmates confined at that institution are deemed to pose the greatest threats to institutional security and safety of staff. DUF # 3, supported by defendant Walker's declaration. Plaintiff seeks to dispute this fact by asserting that not all inmates housed at CSP-Sac pose a security threat, that many are "virtually free of any disciplinary acts of violence. . . . ," but are deemed Level IV inmates because of the sentences they received upon conviction. Opp., Ex. C, p. 1. None of this sufficiently refutes defendant Walker's declaration, currently Acting Warden of CSP-Sac, based on his personal knowledge, and this fact remains undisputed.

CSP-Sacramento is organized in three identical sets of buildings – Facility A, B, and C – with each facility comprised of eight blocks, and each block consisting of 64 cells and 128 beds. DUF # 4.

Facility A is considered a "soft" yard. This is because the inmates housed in Facility A are the former "protective custody" inmates, or those with "sensitive needs." These inmates tend to be very compliant and generally non-violent. This is a mellow yard where there may be one serious incident per year. Facility C generally houses inmates who want to program and stay out of trouble. Facility B traditionally has housed inmates who refuse to program and consistently get into trouble. DUF # 5, supported by defendant Walker's declaration. Plaintiff takes issue with the characterization of Facility A as a "soft yard," averring that it is a yard housing protective custody, Ad Seg, and psychiatric unit inmates per CAL. CODE REGS. tit.xv, § 3341.5. Opp., Ex. C, p. 2. Defendant Walker's description, however, is not refuted by this regulation.

Plaintiff concedes that Facility B has less jobs than the other facilities, and the most "SHU kick-outs," but also avers that it has had less riots since 1999. *Id.* He also maintains that when there is no room available in B-Facility or an inmate has an enemy there, one stays in B-Facility and the other is sent to C-Facility. Plaintiff's objections, however, do not materially dispute defendant Walker's representation based on his personal knowledge.

During 2002 and 2003, approximately 1,000 prisoners were confined in each of the three facilities at CSP – Sacramento. The prisoners in each facility were of all races and ethnic groups – black, white, Hispanic, Asian, American Indian, etc. DUF # 6.

At CSP-Sac, each facility is self-contained and built around a yard where, absent unusual conditions, inmates are allowed to exercise daily. DUF # 7.

Each facility also has four small yards, also referred to as concrete yards. There is one concrete yard between each of the eight housing blocks. These are very small yards measuring about 50 by 50 feet. These yards were not intended to be used for general population exercise. At most, about 20 inmates can be placed on these yards at a time. DUF # 8. Defendants rely again on defendant Walker's declaration in support of these facts. Plaintiff disputes that any one inmate has the opportunity for exercise every day, stating that general population (GP) inmates, when allowed access, are given two-hour exercise periods every other day. Op., Ex. C, p. 2. However, the defendants merely set forth that, under normal conditions, there are daily exercise periods for inmates, not that each inmate has a daily exercise period.

Plaintiff agrees that about 20 inmates at a time are placed on the small concrete yards, but argues that the facilities do not have a small yard between each housing unit, so that two buildings share one mini-concrete yard, but states that in B-Facility there is a small concrete yard attached to each building but Building 5, such that inmates in that building go to the concrete yards for Buildings 6, 7, and 8. *Id.* In his verified second amended complaint, plaintiff states that each housing unit has its own mini-concrete yard. Plaintiff asserts in Ex. E, p. 5, to his Opp., that there are seven mini-concrete yards in B-Facility.

After much searching the court located plaintiff's declaration wherein he sets forth that in his years at CSP-Sac, he has been in each of th[illegible]ight housing units of B-Facility and all but one has a mini-concrete yard, for a total of seven. Opp., Ex. F, p. 15. Therefore, as to the number of small concrete yards, at least in B-Facility, defendants' assertion that there are only four is disputed. Plaintiff also seeks to dispute that the yards measure 50 feet by 50 feet, maintaining instead that "they are slightly bigger in length, and bigger in width then [sic] length." *Id.* Plaintiff points to no exhibit to clarify his representations as to the size of these concrete yards; therefore, as to the size of these yards that fact is essentially undisputed.

In certain circumstances, one or more of the several concrete yards have been used as areas for inmates to exercise in modified programs, but only when staff are certain that inmates will not assault one another and it is safe to release inmates to such yards. DUF # 9. Plaintiff seeks to dispute this fact by saying that the mini-concrete yards are used for lengthy time periods when cells are being searched and/or during lockdowns. Opp., Ex. C, p. 3. He asserts that black inmates go to the mini-concrete yards at different times from when whites go which is different from the time when Hispanics go, with whites and Hispanics occasionally going at the same time. *Id.* He also asserts that officials cannot prevent fights on any yard but can only minimize injury by preventing weapons from coming on the yards by

conducting strip searches as they do routinely. *Id.* None of these contentions substantively dispute defendants' representation that inmates in these areas are in modified programs, although plaintiff is probably correct that staff can never be certain that inmates will not assault each other. However, it is plain that defendants make limited use of the mini-concrete yards, which is not refuted by plaintiff.

A lockdown is the restriction of all inmates to their cells/dormitory beds encompassing no less than a housing unit. True lockdowns are rare occasions, generally following very serious threats to institutional security and the safety of staff and inmates. During a lockdown, all normal programing is suspended until it is determined that it is safe to resume normal programing. DUF # 10.

Normal programing means inmates attend work and education programs. They are released to the yard for recreation in large groups according to their yard schedule. The yard population is limited to 150 inmates at a time. Inmates have regular visiting, canteen, and telephone privileges. They attend the law library and religious services. During a lockdown, however, these programs are suspended and inmates are confined to their cells. Inmate movement is controlled, under close supervision, and under escort with mechanical restraints. DUF # 11.

Pursuant to CDCR policies and procedures, whenever there is a serious incident the initial incident response is as follows: the first priority is to

isolate, contain, and control the situation to the smallest area possible. Next, is to provide medical attention for all injured followed by the preservation of evidence. Staff will then identify all involved persons and ensure appropriate written documentation/ reports are completed and submitted within designated time frames. DUF # 12. Plaintiff states that he is "without sufficient information to admit or deny" this representation, so he denies it. Opp., Ex. C, 4. Lack of information is, of course, wholly inadequate as the basis for disputing an issue of fact on a motion for summary judgment. Thus, this fact is undisputed.

Once the initial incident response is completed, assessment of the causes and determination of program activity status begins. Depending on the seriousness of the situation, it may be necessary to modify or restrict program activities. Available options are to modify programs, lockdown, or declare a State of Emergency. These options serve to restrict potentially volatile persons or groups, and affords additional time to evaluate overall operations. DUF # 13. Plaintiff disputes this fact in the case of assaults on staff with weapons, asserting that in such cases, there is no program assessment, rather there is a total lockdown; he contends that even when the race classified as "others," which he maintains is locked down less than other racial groups, has yard access, this is denominated as a modified program even though other races remain totally locked down. Opp., Ex. C, 4. Plaintiff's opinion as to the protocol for response to an incident, however, does not raise a

genuine issue of material fact in light of defendant Walker's personal knowledge. This fact is deemed undisputed.

If it is determined that a lockdown is necessary, a program status report is immediately developed to ensure both staff and inmates know what is expected. Maintaining essential services, i.e., medical/mental health, hygiene, and access to courts are mandates. The plan is reviewed regularly and revised as scheduled activities are resumed. Staff and inmates are updated as revisions are made. DUF # 14. Plaintiff contends that only hygiene is afforded in the first seven or eight weeks of a lockdown and that memoranda are not passed out "as they should be," without defining either how they are passed out or how he believes they should be. Opp., Ex. C, 4. He does not deny that they are passed out; indeed, his filings and exhibits amply demonstrate his access to multiple copies of these memoranda. This fact is deemed undisputed.

The facility captain generally decides to institute a lockdown and makes the recommendation to the warden who approves or disapproves the recommendation. Once a lockdown is instituted, the warden makes the decision when it is safe to unlock and return to normal programming. DUF # 15. Plaintiff avers that the decision to institute a lockdown is not made solely by the facility captain but is a responsibility shared by an associate warden who also signs the memoranda. Opp., Ex. C, p. 5. However, this does not dispute defendant Walker's declaration that it is

the facility captain who generally makes the decision about lockdowns and then makes the recommendation to the warden.

Following an incident that results in the decision to lock down a facility, the process of investigating and gathering intelligence begins. This includes searches of all inmate cells, common areas, dining halls, janitorial rooms, and the outside yard. Searching the outside yard often consists of digging up the ground in search for weapons. The purpose of these searches is to uncover any weapons that will later be used to harm inmates or staff. DUF # 16. Plaintiff argues that that entire ground is not dug up, but only that portion which activates metal detectors. Opp., Ex. C, p. 5. Defendant Walker does not state that all of the ground is dug up, but only that digging the ground is often involved in the search process. This fact also remains undisputed.

While it may take anywhere from 15 to 20 days to complete a search of a facility, this time may be significantly extended if during the search critical information is discovered necessitating further searches. DUF # 17. Plaintiff contends that it does not take 20 days to conduct a search and that cell housing units are never searched twice during a lockdown. Opp., Ex. C, p. 5. Plaintiff does not provide an adequate basis for this conclusion. Plaintiff has elsewhere stated that lockdowns to search for missing metal have not involved a long period, from nine to fourteen days, but although he provides exhibits as to when such a lockdown began, he does not present evidence, other

than his own recollection, showing when they ended. *See, e.g.*, Opp., Ex. 15, p. 1. Plaintiff does not adequately support the basis for his disagreement with a fact supported by the personal knowledge of the Acting Warden, and the court will deem the fact undisputed.

[While searches are conducted], inmate interviews are also conducted. Every inmate in the facility is interviewed. This can be anywhere from 1000 to 1100 inmates. Staff are also interviewed. The purpose of the interviews is to gather intelligence for the purpose of determining when it is safe to return to normal programing. The interview process may also be extended depending on the type of information obtained and the necessity for following up on leads. DUF # 18. Plaintiff disputes that with the four staff stabbing assaults at issue that the entire inmate population "accepted" an interview each time, such that the number of inmates interviewed would be reduced. Opp., Ex. C, p. 5. Plaintiff also contends that "[t]he process of interviews is never extended." Plaintiff does not adequately set forth a basis to support these conclusory statements, failing to effectively dispute the personal knowledge sworn to by defendant Walker.

In addition, staff are communicating with other institutions as well as headquarters to compare the intelligence gathered and ensure that it is safe to resume normal programing. It is common to have staff at other institutions interview inmates there as well as to monitor their mail and telephone communications.

The main priority is always the safety of inmates and staff while working on a plan to unlock the facility. DUF # 19. Plaintiff disputes that inmates at other institutions were interviewed about the four stabbing attacks on CSP-Sac B-Facility staff. He also does not believe that inmates can help staff to gain information if the acts are spontaneous or isolated and the inmates have no information about them and that an inmate's fear of being labeled a snitch is not what slows up an investigation. Opp., Ex. C, 6. Plaintiff does not reveal to the court how he knows that inmates at other facilities were not interviewed and his belief that lockdowns are not conducive to information-gathering is irrelevant to this fact. This fact is deemed undisputed.

It is the CDCR's policy to return to full normal programing as soon as it is safe to do so. Depending on the magnitude and dynamics of the incident, movement towards full program activities will be made. DUF # 20. Although plaintiff objects to this approach, he does not deny that this is what occurs.

How a facility is unlocked depends greatly on the nature of the incident and is determined on a case-by-case basis. Movement back to full normal programing is planned and occurs during normal business hours when the majority of regularly scheduled staff are present and have been fully briefed on the plan of operation. DUF # 21. Plaintiff denies that when the incident at issue is an assault on staff that the unlocking is on a case-by-case basis, but he does not

clarify how the process actually worked in his view. This fact is deemed undisputed.

The task of releasing inmates to full normal programing is accomplished incrementally beginning with small numbers of inmates and progressing to larger numbers as it is determined that it is safe to do so. Generally, critical workers are released first. Additional increases in numbers are accomplished by expanding the critical workers list and returning inmates first to priority assignments. As inmates are returned to work assignments, their privileges are also restored incrementally. DUF # 22. Plaintiff contends that it is never unsafe to unlock uninvolved inmates. Opp., Ex. C, p. 7. The fact that plaintiff takes issue with the manner in which prisoners are released from lock down does not dispute the actual method by which they are unlocked. This fact is deemed undisputed.

The remaining and unassigned inmates are then included in releases for return to full programing. Generally, non-involved races are released first, followed by non-involved groups (gang affiliations), and so on. Inmates are released in small groups to the dayroom and/or the recreation yard. This provides staff an opportunity to observe their conduct in a controlled setting. During releases of these inmates, incremental positive program activities are also scheduled for them such as telephone calls, canteen, or quarterly packages. DUF # 23. Plaintiff denies that this was the process defendants took in three of the four lockdown periods at issue. Plaintiff claims that

privileges came first and then critical care workers were released. Plaintiff maintains that CSP-Sac B-facility inmates were not given dayroom rights. Opp., Ex. C, p. 7. (That plaintiff also maintains that staff assaults cannot be prevented by observing inmate conduct is irrelevant to what the process is). Plaintiff does not substantively dispute this fact which sets forth what the general unlock process is and that access to a recreation yard can be an alternative to dayroom access.

There are times when during the unlock process, another incident will occur requiring that those inmates who have begun the incremental release process be locked down until an investigation of the incident can be completed. DUF # 24.

During a lockdown, there are mandatory weekly meetings with the warden (or chief deputy warden) to discuss the status of the lockdown, in addition to daily briefings. The purpose of the meetings is to report to the warden on the status of the lockdown and to continue developing a plan to resume normal programming as soon as possible. The meetings focus on investigation updates to determine progress, review interview/intelligence results, and establish or revise the plan of operation. The warden may require more frequent meetings depending on the individual circumstances related to each lockdown. Those present at these meetings include the Warden or Chief Deputy Warden, Facility Captain, Associate Warden, Use of Force Coordinator, and any other line staff member with relevant information. DUF # 25.

Plaintiff bases his dispute with this fact on his lack of information about the process (Opp., Ex. C, p. 8), which renders the fact undisputed.

Between the period of January 2002 through September 2003, there were four very serious inmate assaults on staff in Facility B with the use of inmate manufactured weapons. Following each incident, the decision was made to place the facility on lockdown status until an investigation could be completed and it could be determined that it was safe to unlock. DUF # 26. Plaintiff does not take issue with the fact that there were four serious staff assaults from January 2002 through September 2003, involving inmate manufactured weapons. Opp., Ex. C, p. 8. Nor does he deny the facility was placed on lockdown status following each incident. Therefore, in essence, plaintiff does not dispute this fact.

In addition to the staff assaults, there were various other incidents of violence during the relevant time period involving inmates and the use of inmate manufactured weapons. All of these factors, combined with the information that was being uncovered through interviews, searches, and monitoring of inmate mail and communications, contributed to the duration of the lockdowns. DUF # 27. Plaintiff asserts that the staff assault incidents were unrelated, that beyond the January 4, 2002 interview process, it was unnecessary to delay or deny black inmates mini-concrete yard access. He claims that the inmate involved in the January 4, 2002, attack on Officer Haggard was called back by the officer as he

was returning to his cell, demonstrating that the attack was not planned. Plaintiff also argues that inmate assaults involve only the race or groups who take part even when serious and that only the perpetrator's cellmate was put in Ad Seg, signifying no reliable evidence from interviews and interviews take at most three days. Opp., Ex. C, p. 8. Plaintiff mentions elsewhere that all eleven individuals involved in the attack were placed in Ad Seg as well, but his point seems to be that having no one else placed in Ad Seg means that the interviews netted no significant information and thus there was no basis for keeping uninvolved races, including blacks, locked down. However, plaintiff does not explain how he could know what information was garnered in the interview process between prison staff and other inmates. The court will deem this fact undisputed.

January 4, 2002 until April 3, 2002

Defendant Steve Vance was the Facility captain over B Facility from September 2001, to September 2003. DUF # 28.

On January 2, 2002, an inmate turned on Officer Haggard and attempted to murder him. As staff responded to the incident, other inmates joined in and attacked responding staff members. In total, 11 inmates brutally attacked four correctional officers in the B Facility ¾ dining room. Inmate manufactured weapons were used in the attack. The involved inmates refused several orders to stop the attack. DUF

29. Plaintiff seeks to dispute that the attack was attempted murder because he believes that an attempted murder is a planned attack and he contends that the Hispanic inmates who joined in the attack were following peer pressure rules to assist a fellow race or gangmember. Opp., Ex. C, p. 9. Plaintiff's belief as to whether or not the attack was an attempt to murder or not is essentially irrelevant without his providing any basis for it; he does not allege that he witnessed the attack. He has no information to dispute what weapons were or were not used. This fact is deemed undisputed.

Three of the four officers received injuries consisting of puncture wounds. They were transported to the hospital where they received treatment for their injuries. Officer Haggard was hospitalized in the intensive care unit. DUF # 30.

As responding staff assisted in searching and escorting the involved inmates out of the dining room, staff discovered an inmate manufactured weapon on the floor between the fourth dining room table from 4 block and the wall. The weapon measured approximately 5 ¾ inches long by ⅛ inches in diameter, and was constructed of a sharpened metal point measuring approximately 15/16 inches long, attached to a plastic pen to form a handle. DUF # 31.

During a subsequent search of the dining room by the investigative services unit, staff discovered one inmate manufactured weapon secreted inside a milk carton on the fourth dining room table from 4 block.

The weapon measured approximately 4 ¾ inches long by ¾ inches in diameter. It was constructed of round metal rod, sharpened to a point at one end and wrapped with tape and cellophane at the other. DUF # 32.

A lockdown of all inmates in B Facility was ordered and the decision was approved by Warden Pliler. Exh. B, ¶ 8. During a lockdown, inmates are confined to their cells. They are cell fed and are allowed to exit their cells for controlled showers. They are provided essential services such as medical attention. Inmates are not allowed to go to their assigned work or education programs. They are not allowed to go to the yard because of the degree of danger which presents itself when there are large numbers of inmates on a yard at the same time. DUF # 33.

Pursuant to CDCR policy and procedures, immediately following the lockdown, an investigation was commenced into the cause of the assault on staff. It was unknown at the time whether this was an isolated incident or whether there were other possible planned attacks on staff. Staff worked diligently to identify whether there were other inmates who played a role in the attack on staff and have those inmates removed. DUF # 34. Plaintiff seeks to dispute that defendants did not know whether or not the incident was isolated or planned. Plaintiff refers to defendant Vance's response to interrogatory 5, set two, with no identification as to its location. After culling through a myriad of discovery documents plaintiff submitted with his opposition (but did not

cross-reference), the court located the following response, after objections were posed, to plaintiff's inquiry as to whether the January 4, 2002, incident was "planned, spontaneous or isolated." Defendant Vance responded: "The January 4, 2002 staff stabbing assault was planned by those involved." This does not supply plaintiff with adequate support to dispute that defendants did not know at the time whether or not the assault was planned. Plaintiff further avers that no other inmates than the eleven involved (and one of their cellmates, according to plaintiff earlier) were placed in Ad Seg as a result of the January 4, 2002, incident, apparently attempting to cite the incident report filed by defendants. Opp., Ex. C, p. 9. However, defendants do not assert otherwise. This fact is undisputed.

The first month following the incident was occupied with conducting searches, interviewing inmates and staff, and gathering intelligence from various sources. This entailed interviewing all of the inmates in B Facility consisting of approximately 1000 to 1100 inmates in the facility at that time. The inmates refused to talk for fear of retaliation by other inmates. As a result, the information was slow in coming forward. DUF # 35. Plaintiff disputes that searching the facility and interviewing inmates takes a month. He asserts that housing block floor officers conduct the interview at least at the rate of a unit a day and that a search takes 9 to 14 days for support of which he cited an unidentified exhibit. The court located one of plaintiff's many affidavits in which he bases his

knowledge of how long searches take on the general knowledge of inmates without proffering any substantiating information as to when a search ended. Opp., Ex. C, p. 10; Ex. G, p .6. This fact is deemed undisputed.

Additionally, staff had to conduct thorough searches of all inmate cells as well as common areas. During these searches, the main yard was dug up in search of weapons that could have been buried. DUF # 36. Plaintiff disputes that searches were more thorough than when metal is missing or would take more time and again denies that the entire yard was dug up. Opp., Ex. C, p. 10.

Furthermore, during the process of investigating and gathering intelligence, staff were presented with information which raised more questions and concerns. Because they could not be certain that this was an isolated incident, it was not safe to unlock or to begin the process of restoring yard privileges to the inmate population. DUF # 37. Defendants cite defendant Vance's declaration in support of this fact (defendants' Ex. B). Plaintiff disputes that defendants ever received reliable information that the incident was other than isolated. He contends that no reliable information ever emerged that black non-affiliated inmates were involved in a continued threat to staff. He cites defendant Vance's response to his interrogatory wherein Vance answers "No" to plaintiff's question whether any black inmate was involved in the January 4, 2002 staff stabbing assault. Opp., Opp., Ex. C, p. 10; Ex. 7, p. 3. Plaintiff's objections to

defendants' representation that information presented during any investigation raised more questions and concerns is well-founded in that defendants do not provide any description of the information. This fact is disputed.

Also of great concern was the fact that the inmates who assaulted staff were Southern Hispanics. This prison group is the most influential, organized, and dangerous prison group. Generally, attacks such as this one do not occur unless it has been approved by the leaders of this group. Because of this, it was believed that the Southern Hispanics had put a hit out on staff. DUF # 38. Plaintiff does not deny that the Southern Hispanics were the ones involved in this incident or that they are the most dangerous of prison groups but asserts his opinion that the melee could have been caused without a leader orchestrating it. However, plaintiff does not thereby materially dispute this fact, which remains undisputed.

There was a very serious and viable threat to staff safety that had to be fully investigated. The threat level was the highest defendant Vance had seen in his 22-year career with CDCR. DUF # 39.

Staff were also investigating the possibility that the attacks had been ordered by the Mexican Mafia at Pelican Bay State Prison (PBSP). Staff was communicating with prison staff at PBSB as well as other institutions and comparing information and verifying leads. Inmates at PBSB were also being interviewed in an attempt to gain information. DUF # 40. Plaintiff

seeks to dispute DUF # 39 & # 40 by averring that after the eleven inmates involved were placed in Ad Seg that there was no further threat and that any further investigation was based on fear or was a fishing expedition. Plaintiff's opinion is not enough to dispute the defendant Vance's assessment based on personal knowledge. These facts are deemed undisputed.

Inmates in the other facilities at CSP-Sac were also being interviewed, as well as those in Ad Seg. Staff were reading inmate mail in search of information. Notes were also being passed by inmates to staff with information which had to be verified. DUF # 41. Plaintiff seeks to dispute this fact on the ground that he has no information about it, which, of course, does not raise a genuine issue of material fact. This fact is undisputed.

As a result, during the initial phase of the investigation, the inmates in B Facility were not permitted to return to their regular program activities, including daily yard exercise, until all involved inmates could be identified and removed from the general population and all searches for weapons had been completed. Defendant Vance and other custodial staff responsible for B Facility concluded that until the investigation was complete and all involved inmates could be identified and removed from the general population in B Facility, release of prisoners to the main exercise yard posed an unacceptable risk of renewed violence that threatened the safety of inmates and staff. DUF # 42. Plaintiff avers that all

involved inmates were identified when the eleven involved in the attack were sent to Ad Seg on the day of incident, citing the Crime Incident Report (MSJ, Ex. F, p. 3); that black inmates posed no threat and that there was no reason to deny black inmates access to the small concrete yards. Opp., Ex. C, p. 12. At the time, defendant Vance was the captain of B-Facility and his assessment based on his own personal experience and knowledge and the assessment of other custodial staff to which he also refers is not disputed by plaintiff's contentions and this fact is deemed undisputed.

Between January 4, 2002 and March 8, 2002, through interviews and searches, staff continued to obtain information, which indicated that there was a serious and viable threat to institutional safety. While the goal was to return to normal programing, defendant Vance's first priority was to ensure the safety of staff and inmates. Due to the nature of the information that was being revealed through the investigation process, and staff's responsibility to follow all leads, it was not safe to begin the process of releasing inmates. DUF # 43. Plaintiff concedes that searches were needed, but maintains that they could have been completed within 14 days and that those not involved in the attacks could have been released to the mini-concrete yards; he disputes that the safety of non-Hispanic inmates was jeopardized. Because defendants do not in any way demonstrate or describe the information that they represent that they obtained upon which they found a serious, viable threat,

preventing them from processing the release of inmates to normal programming, the court finds plaintiff's dispute as to this fact raises a genuine issue of material fact.

Also, on February 22, 2002, there was another attempted murder of a peace officer by inmates in C-Facility. This incident occurred only one day after C-Facility began the process of unlocking that facility. While this incident occurred in a different facility, it affected both A-Facility and B-Facility because of the nature of the assault on staff and the fact that there existed a viable threat against staff members. DUF # 44. Plaintiff contends that the incident in C-Facility did not implicate B-Facility and that the fact that 14 days later B-Facility was being unlocked demonstrates this; moreover, plaintiff declares that no investigation was conducted on B-Facility re: the February 22, 2002 assault in C-Facility. Opp., Ex. C, p. 13; Ex. G, p. 3. The problem with this opinion is that plaintiff does not make clear how he could know if any investigation concerning this incident took place on B-Facility. Moreover, defendants do not state that they conducted such an investigation, merely that it indicated a threat to staff and that it had an impact on A-Facility and B-Facility. This fact is deemed undisputed.

On March 8, 2002, staff began the process of releasing inmates in B-Facility to normal programing. Pursuant to CDCR policy, the critical workers were released first by giving them the opportunity to go to the yard for exercise on Saturdays and

Sundays, and restoring various other programs and privileges to this group. This group consisted of approximately 95 inmates. This allowed staff to observe these inmates in relatively small numbers. On March 14, 2002, about 35 critical workers were added to the group. DUF # 45. Plaintiff disputes that the release of critical workers first is pursuant to CDCR policy but does not show how it does not comport with that policy in the face of defendant Vance's declaration based on his personal knowledge. This fact is deemed undisputed.

On March 27, 2002, the critical worker's list was augmented to include approximately 210 workers, including plaintiff. DUF # 46. Plaintiff does not dispute this fact but actually represents that he was released a day earlier, rendering this fact essentially undisputed.

Other groups of inmates were incrementally added to the list of inmates to be released. By April 3, 2002, all non-Hispanic inmates in B Facility were allowed to go to the yard for exercise according to an approved yard schedule. DUF # 47.

On April 15, 2002, a stabbing/slashing assault occurred on the main exercise yard involving white inmates. This incident delayed efforts to resume a full normal program, however, staff continued to work diligently in doing so. DUF # 48. Plaintiff disputes that he ever was locked down due to this incident, but that does not dispute defendants' point that this

incident delayed the resumption of a full normal program. This fact is deemed undisputed.

The entire time, weekly meetings with the warden, associate warden, Facility captain, Use of Force coordinator and other critical staff members were taking place to discuss the progress made and the status of the lockdown. DUF # 49. Plaintiff sets forth no basis to dispute this fact but nevertheless seeks to do so. This fact is deemed undisputed.

May 8, 2002, until July 31, 2002

On May 8, 2002, while still in the process of resuming a full normal program in B-Facility, Officer Tuter was attacked by a black inmate with an inmate-manufactured weapon. The inmate aggressively attacked Officer Tuter by striking him repeatedly in the head with a weapon. The weapon was 4 & ½ inches long, ½ inch wide, ¼ inch thick, and sharpened to a point at one end. The other end was covered in two inches of plastic wrap as a handle. The weapon appeared to have been fashioned from a tooth brush. DUF # 50. MSJ, Exh. B, Vance Declaration ¶ 25; Exh. G, 5/8/02 Crime Incident Report. Plaintiff denies that prison officials were in process of resuming a full normal program in B-Facility because whites were still locked down. Plaintiff does not make clear how he knows whites were still locked down; more significantly, he does not show how even if they were, how that would signify that staff was not in the

process of resuming a normal program. This fact is deemed undisputed.

As a result of the attack on Officer Tuter, as well as the prior January 4, 2002, attack on other staff members, and the April 15, 2002, stabbing/slashing assault by white inmates, defendant Vance ordered a lockdown of all inmates in B-Facility. The decision was approved by Terry Rosario who was the acting warden at that time. DUF # 51. Plaintiff takes issue with whether or not any of these incidents were related, contending that each was an isolated event (Opp., Ex. C, pp. 1-16), but this does not materially dispute what defendant Vance states was behind his decision to order a lockdown. This fact is deemed undisputed.

All programs were suspended, including the use of the yard for recreation purposes. DUF # 52. Plaintiff contends that white inmates (except for critical workers) and Southern Hispanics were still on lockdown from the April 15, 2002, assault and the January 4, 2002, incident, respectively, so only black inmates actually had programs suspended by the May 8, 2002, incident. However, as that means that all inmates had program suspended at this point, there is no dispute as to this fact.

Pursuant to CDCR policy and procedures, immediately following the lockdown, an investigation was commenced into the cause of the attack of Officer Tuter. This included a search of all cells and common areas, interviews with all inmates and staff, and

gathering of intelligence and information from other sources. DUF # 53. Plaintiff protests that an investigation was unnecessary, pointing to defendant Vance's response to one of plaintiff's interrogatories in support of the finding that a lone inmate was responsible for the May 8, 2002, incident. However, defendant Vance's response to plaintiff's query on the subject of who was responsible for that incident does not support his position that no investigation was needed: "At the time of the assault on Officer Tuter, we did not know if the assault had been planned and carried out by one inmate, or by a number of inmates. At the conclusion of the investigation, it was determined that the assaulting inmate was acting alone." Opp., Ex. C, p. 16; Ex. 7, p. 4. This fact is deemed undisputed.

Inmates were not talking and the information was slow in coming forward. DUF # 54. Plaintiff asserts that inmates were not talking because they did not know anything as the incident was isolated. However, whether this is true or not, it does not dispute the fact as set forth by defendant Vance based on his personal knowledge.

By July 1, 2002, some of the privileges were being restored to inmates such as visiting, canteen, packages, and telephone access. On July 11, 2002, Southern Hispanics and Mexican nationals were allowed to use the small concrete yards for recreation in groups of up to 16 inmates per yard. The whites,

American Indians, others,[5] and critical workers were released to the main yard in groups of up to 50 at a time. By July 16, 2002, Southern Hispanics were released to the small concrete yards in groups of up to 20 inmates. Whites, American Indians, Mexican nationals, and others were released to the main yard in groups of up to 100 inmates. By July 31, 2002, blacks were released to the small concrete yards in groups of up to 20 inmates and all other inmates were normal with a maximum of 150 inmates on the main yard at a time. DUF # 55. Plaintiff does not really dispute the facts as set forth, that is, he does not raise an issue as to when privileges and exercise periods were restored to which group of inmates, but simply maintains that privileges and exercise were not restored as a result of the investigation having uncovered any information, but only because no progress was made, which does not dispute the fact as declared by defendant Vance.

Over the course of the next few months, staff continued to work towards resuming a full normal program in all respects. On occasion, they experienced some setbacks resulting in temporarily suspending yard and privileges at various times due to threats on staff and inmate safety, or based on information received indicating there was a threat of violence. Nonetheless, Defendant Vance and other

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[5] Defendants state that the classification of "Other" is given to the Asian and Pacific Islander group of inmates.

staff continued to work towards the goal of resuming a full normal program. DUF # 56. Plaintiff does not dispute this fact substantively but merely states that a full normal program is not needed, only access to the a mini-concrete yard. This fact is not disputed.

The entire time, meetings with the warden, associate warden, Facility captain, Use of Force coordinator and other critical staff members were taking place to discuss the progress made and the status of the lockdown. The meetings were taking place at least twice a week. DUF # 57. Plaintiff has no basis to dispute this fact and admits it but still seeks to do so. Opp., Ex. C, p. 18. (From this point, the court, without noting it, will simply deem a fact undisputed if plaintiff offers an opinion without making a relevant point or does not proffer at least some basis for a dispute).

December 28, 2002, and ended on June 1, 2003

On December 28, 2002, a riot occurred on the B Facility main exercise yard where a large number of black inmates attacked and physically assaulted staff. The attack began when Sergeant (Sgt.) Murphy observed two inmates engaged in what appeared to be a fistfight on the B Facility main exercise yard. Sgt. Murphy ordered the two inmates to stop and get down, but they did not comply. Sgt. Murphy instructed the central tower officer to order the yard

down.[6] Sgt. Murphy used his O.C. pepper spray on the two inmates and they immediately got down on the ground. Sgt. Murphy was then attacked by another inmate. At the same time, numerous other inmates got up and ran towards Sgt. Murphy to attack him. Sgt. Murphy was forced to the ground and five inmates jumped on him and struck him numerous times. DUF # 58. MSJ, Exh. B, Vance declaration ¶ 33; Exh. H, Crime Incident Report for incident on 12/28/02.

As other staff members responded to the yard, inmates got up from the prone position and attacked the responding staff. Many of the inmates had inmate manufactured weapons. In total, six inmate manufactured weapons were recovered. DUF # 59.

Based on subsequent staff interviews and reports, it was determined that the fist fight between the two inmates was a diversion for the purpose of distracting and attacking staff. Further investigation and review of the videotapes of the incident identified at least 24 inmates as active participants on the staff assaults. DUF # 60. Plaintiff purports to dispute both defendant Vance's declaration and the finding in the Crime Incident Report that there were 24 inmates involved because defendant Vance stated in an interrogatory response that "at least a dozen gang

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[6] Defendants explain that "yard down" requires that all the inmates get down in the prone position and remain in that position until staff instruct them to get up.

affiliated Crips were involved in the assaults on staff on December 28, 2002." Opp., Ex. C, p. 18; Ex. 7, p. 4. Defendant Vance's interrogatory response does not dispute his declaration or the Incident Report. This fact is undisputed.

Nine staff members sustained injuries as a result of this incident. DUF # 61.

At the time of this incident, B-Facility was still in the process of unlocking and resuming a full normal program. This incident, coupled with numerous other incidents of violence between the inmates, led to defendant Vance instituting a full lockdown again. DUF # 62.

The other incidents of violence included an incident on August 22, 2002, on the B-Facility 7 block and 2 block mini concrete yards involving white and Hispanic inmates, where numerous inmates received serious injuries. Subsequent to this incident, numerous inmate-manufactured weapons were discovered in possession of the white and Southern Hispanic inmates. DUF # 63.

Also, on October 3, 2002, during the unlock process, another incident occurred on the B-Facility main yard involving white and Hispanic inmates which also resulted in several inmates receiving serious injuries. Again, numerous inmate manufactured weapons were discovered in possession of the white and Southern Hispanic inmates. DUF # 64.

Finally, on December 15, 2002, during evening showers, another incident occurred involving white and Hispanic inmates resulting in an inmate receiving serious injuries. DUF # 65. Plaintiff expressly agrees with this fact. Opp., Ex. C, p. 19.

Due to all of these violent incidents, it was determined that there was a threat to everyone's safety and security and therefore, all Level IV inmates would remain on lockdown status until further notice. DUF # 66. Plaintiff points to his Ex. 17, a copy of an August 19, 1999, memorandum which sets forth an unlock procedure and which plaintiff contends supports his contention that white, black and Hispanic inmates could have been separated and given access to the mini-yards; in other words, plaintiff asserts that full lockdown status was not required for non gang-affiliated blacks (or whites or Hispanics). Opp., Ex. C, p. 19; Ex. 17. Notwithstanding, this does not dispute the fact that prison authorities determined there was a threat and ordered a lockdown. This fact is deemed undisputed.

An investigation into the December 28, 2002, attack on staff was immediately commenced. This included a search of all cells and common areas, interviews with all inmates and staff, and gathering of intelligence and information from other sources. DUF # 67.

Over the course of the next several months, staff continued to work towards resuming a full normal program in all respects, encountering setbacks in the

process. On February 16, 2003, an incident occurred in B-Facility 4 block involving white inmates and the use of a deadly weapon, causing a delay in staff's efforts to unlock the facility. Nonetheless, defendant Vance and his staff continued to work towards the goal of resuming a full normal program. DUF # 68. Plaintiff contends that a full normal program could not exist with white and Hispanic inmates at war, and with whites assaulting each other; however, he avers that non-affiliated black inmates did not need to be separated from each other, nor did Hispanic inmates. Ex. C, p. 20. Whether true or not, none of this disputes the fact as set forth.

By February 21, 2003, the process of unlocking B-Facility began. Staff started by releasing a small number of uninvolved inmates first and observing their behavior prior to adding to the groups. On March 18, 2003, they began releasing the whites and Hispanics to the small concrete yards in small groups. DUF # 69. Plaintiff protests that this took too long but does not actually dispute the fact.

Staff continued to encounter setbacks. On May 5, 2003, there were two separate stabbing assaults involving white inmates in which both victims sustained serious injuries. On June 1, 2003, there was a slashing incident involving white inmates. Staff, however, continued moving forward with the plan to incrementally unlock the facility. DUF # 70.

By May 15, 2003, Asians and American Indians were released to the yard on a normal schedule.

Hispanics were released to the small cement yards. Blacks were released to the small cement yards on a rotating schedule. DUF # 71. Plaintiff protests that all these groups could have received mini-yard access sooner, but this, of course, does not dispute the fact of when the releases actually occurred.

As with all other lockdown situations, weekly meetings with the warden, associate warden, Facility captain, Use of Force coordinator and other critical staff members were taking place to discuss the progress made and the status of the lockdown. These meetings were taking place more often than once a week. DUF # 72.

September 3, 2003, until November 4, 2003

Defendant David Willey was in the position of Acting Captain of Facility B from September 2, 2003 to September 19, 2003, and then again from October 14, 2003 to January 16, 2004. DUF # 73. MSJ, Ex. C, defendant Willey's declaration ¶ 3.

On September 3, 2003, Officer Curry was brutally attacked by an inmate with an inmate manufactured weapon (metal can lid). Officer Curry was slashed numerous times in the face and neck areas, punched in the nose, and flung down the stairs by the inmate. DUF # 74. Exh. C, ¶ 4; Exh. I, Crime Incident Report for 9/3/03 incident.

As a result of the attack on Officer Curry, defendant Willey ordered a lockdown of all inmates in

Facility B. The decision was approved by the defendant warden. Based on staff's perceptions of the staff assault and the injuries incurred, defendant Willey believed it would be prudent to lock down the inmates and attempt to find out the dynamics of the assault on staff and at the same time give staff an opportunity to decompress after the trauma of the incident. Defendant Willey also believed that due to the unusual number of staff assaults, which had taken place in a relatively short period of time, it was necessary to conduct an investigation to gather information from inmates willing to talk with staff concerning the reasons for the staff assaults. Prison officials needed to ascertain the causes of the attack and whether there was a conspiracy to attack staff. DUF # 75. Plaintiff points to interrogatory responses by defendants Vance 12/28/02 attack was committed by Crips, *see above*, and defendant Walker, Opp., Ex. 8, p. 3, which shows that the 9/3/03 assault was initiated by a Crips-affiliated inmate. This does not dispute the fact as set forth by defendants.

Additionally, because of the unusually high number of recent staff assaults, a State of Emergency was declared by the director of the CDCR. A state of emergency can only be declared by the director. During a state of emergency, the warden may authorize the postponement of nonessential administrative decisions, actions, and the normal time requirements for such decisions and actions as deemed necessary because of the emergency. This may include, but is not limited to, classification committee hearings,

disciplinary proceedings, and the review and action on inmate appeals. DUF # 76.

Immediately following the lockdown, an investigation was commenced. The investigation involved interviewing all inmates and conducting searches. There were approximately 1000 to 1100 inmates in Facility B and all inmates had to be interviewed. This is a time-consuming process because the inmates had to be removed from their cells and escorted to the program office to be interviewed one at a time. DUF # 77. Plaintiff asserts that interviews are quickly completed, involving a few formulaic questions, but he does not provide adequate support for how he could know how any inmate's interview other than his own could have unfolded. This fact is deemed undisputed.

In many instances, inmates refused to talk for fear of being labeled snitches. For example, when an inmate is removed for an interview, the other inmates in the housing unit know why he has been removed from his cell. If the inmate is gone for a long period of time, say an hour, and all other inmates were only gone for 15 minutes, the others assume the inmate is "talking" and this may jeopardize the safety of that inmate because he is now labeled a snitch. Therefore, staff was forced to use other means or excuses for removing inmates who had information they were willing to divulge. The process took a great deal of time to complete. DUF # 78.

The weeks following the incident were also occupied with conducting searches. Every cell had to be searched, as well as all common areas. This too is a very time-consuming process that takes several weeks to complete. DUF # 79. Plaintiff repeatedly takes issue with the amount of time defendants state that it takes to complete searches, asserting that it takes twenty to thirty minutes to search a cell, that there are twenty to twenty-four cells in a section, three sections to a block and eight housing blocks, and that at most even if each second and third watch searched a section a day, it would not take more than 14 days to conduct a search in total. Opp., Ex. C, p. 23. Plaintiff raises some dispute as to the precise length of time it should take officials to conduct a search; although defendant Willey does not posit a particular length of time in this fact, plaintiff raises an issue with respect to how time-consuming the search could be.

Furthermore, during the interview process and searches, information was discovered or leads were given, which had to be pursued. For example, during interviews, information was divulged indicating that more assaults on staff were planned. These leads had to be followed and fully investigated before inmates could be released to their normal programs. For example, staff received information that the attack on Officer Curry was the result of a personal conflict the inmate had with another staff member and Officer Curry was the target of opportunity. However, staff also received information that inmates affiliated with

the Blue Note Crips were conspiring to assault staff. In light of this information, it was not safe to release inmates prior to investigating and having a certainty that no further violence was planned. DUF # 80.

Additionally, the information discovered had to be shared with other institutions. Information is routinely shared with all other institutions via the Incident Report. The Incident Report is sent to CDCR Headquarters for tracking purposes. The Incident Report is also given to the Law Enforcement Investigative Unit (LEIU) for information gathering. The LEIU is able, by way of these reports, to advise the director of any patterns that may be occurring statewide. For example, staff would be able to determine if a particular ethnic group, prison gang, or disruptive group was committing an unusual number of staff assaults. This information is shared via conference calls with the director's office to all institutions, as well as e-mails. DUF # 81.

This process took time, and in this case, it took approximately four weeks before prison officials felt they had sufficient information to begin the process of incrementally unlocking the inmates in Facility B. The main priority was to ensure the safety and security of all staff and inmates. The only way to do so was to conduct an investigation and to keep the inmate population locked down until it could be determined that it was safe to begin unlocking the inmates. It was simply not safe to release inmates to yards in great numbers without being confident that similar attacks would not occur. DUF # 82.

Releasing the inmates to the small yards was not a feasible alternative at that time because officials were still in the process of gathering information and were not confident that it was safe for either staff or inmates to be released even in small groups of 20. Prison officials did not have the information available to determine if a threat to staff existed with the inmates. Releasing inmates at this point with little or no information could result in more staff/inmate assaults as the inmates were being processed out to the yard, even in small groups. Without reliable information, inmates allowed to go to the yard could, in fact, have enemies being released at the same time. DUF # 83. Plaintiff disputes that it would have been unsafe to release inmates in small groups, segregated on the basis of ethnicity, who were not among the group involved in the attack. Plaintiff avers that the method could have been similar to the Ad Seg process, whereby inmates are handcuffed one cell at a time, with a metal detector wanded over them. Opp. Ex. C, p. 24. This fact is in dispute.

By October 14, 2003, white, Hispanic, and other inmates began to be released for normal programing, including the yard, while the investigation was ongoing. On November 4, 2003, the lockdown was lifted for non-Crip black inmates. By December 3, 2003, Facility B returned to normal programing. DUF # 84.

As groups of inmates were being incrementally unlocked, prison officials continued to investigate and obtain information. Part of this process included

observing the conduct and behavior of those inmates as they were unlocked. DUF # 85.

While the lockdown was instituted as a result of the September 3, 2003, assault on Officer Curry, the length of the lockdown was directly affected by the information obtained during the investigation following the assault. It was also affected by "incidents" between the groups of inmates which occurred during the investigation and the process of incrementally unlocking. All of these factors were critical in the decisions during the lockdown. DUF # 86. Plaintiff disputes that any information gathered related to Hispanic and white stabbing assaults could have impacted the black non-gang affiliated inmates or the group known as "others." This raises an issue because defendant Willey does not characterize or describe the information obtained.

Weekly meetings were held in which the warden, associate warden, Facility captain, Use of Force coordinator, and any other staffmember with information were present. The purpose of these meetings were to report back to the warden on the progress staff were making in restoring the facility to a normal program. During these meetings, staff discussed the progress of the investigation and the information obtained. DUF # 87.

Meetings with staff were also held to disseminate information regarding the progress of the investigation and unlock procedure. This also gave staff the opportunity to pass on information they may have

gathered from inmates within their housing units that could impact the unlock process. DUF # 88. Plaintiff avers that no information obtained ever resulted in disciplinary action against any inmate other than those who took part in the four incidents at issue who were identified by their participation on the days of the incidents. However, even if true, this does not dispute the fact that officials were sharing whatever information they had with each other.

Given the nature of the attack on Officer Curry, the long history of violent outbreaks in Facility B, and the numerous attacks on staff in the preceding year and a half, as well as other incidents of violence, the lockdown was necessary in order to ensure the safety of all staff and inmates. DUF # 89. Plaintiff maintains that the responsible inmates had been punished for the three preceding incidents and that the 9/03/03 incident should not have led to the extended deprivation of all physical exercise for non-gang affiliated blacks, others, Southern Hispanics, Mexican nationals. Opp., Ex. C, p. 26. Notwithstanding defendant Willey's representation, this fact is disputed.

During the first few weeks of the lockdown, inmates could not be released to the yard because prison officials did not have sufficient information to conclude that it was safe to release large numbers of inmates to the yard. DUF # 90.

It has been defendant Willey's experience that releasing inmates, even in small groups, without the

benefit of reliable information, could result in assaults of inmates or staff. If an inmate has a conflict with another inmate and staff do not have information to indicate that the conflict is more than a personal issue, it could result in a confrontation not only between the two inmates but also between any associates of the inmates. Staff have no way of knowing if a particular group or affiliation were targeting members of their own group for assault. The number of inmates released is not necessarily relevant to what may occur on a small yard. The leaders of inmate groups/gangs/affiliations expect and demand retribution for any perceived wrong. They expect even one inmate of their group to seek retribution, even if out-numbered. For these reasons, it is imperative that staff conduct investigations and follow up on all leads if they are going to ensure the safety of staff and inmates. DUF # 91. Plaintiff continues to aver that each of the four incidents were spontaneous and unrelated such that no amount of investigation could uncover information that did not exist. However, his assessment is insufficient to dispute the personal knowledge and experience of defendant Willey.

As soon as prison officials were confident that inmates could be released and returned to normal programing, the facility was unlocked. DUF # 92. Plaintiff's dispute on this point is more well-taken. Plaintiff contends that the facility was only unlocked when officials were sure that the deprivation to which they had punitively subjected inmates was such that future violence would be deterred, rather than on any

undefined information they may have received. Defendants do not provide any specific basis for the confidence that allowed them to unlock the facility. This fact is in dispute.

Following each one of these incidents, the decision was made to place the facility on lockdown status until an investigation could be completed into the cause of the brutal attacks on staff members. The decision to lock down the facility was based on concerns for both inmate and staff safety. DUF # 93. Termination of a lockdown and a return to normal programming could not occur until all the perpetrators of the violence were identified and transferred to other Level IV institutions, and a determination was made that it was safe for staff and inmates to return to normal programming. DUF # 94. Historically, there had not been many life threatening assaults on staff. Due to the nature of the inmate attacks on staff in these four incidents, and the fact that these were attempts to murder staff, prison officials were forced to take extra precautions and investigate thoroughly to find out the causes of these attacks. DUF # 95. Plaintiff attempts to dispute these facts, attested to by defendant Pliler, the former warden of CSP-Sac (MSJ, Ex. E, Pliler dec.), by arguing that the incidents at issue did not involve attempts at murder because they were spontaneous or isolated, a wholly spurious point even if it were true that the attacks did not entail elaborate planning; he further asserts that the individuals involved were all identified early on. However, without some investigation, officials

could not ascertain this. These facts are not sufficiently disputed by plaintiff to raise a genuine issue.

The investigations were time and labor intensive as prison staff were required to interview all the inmates in the facility, and conduct thorough searches of the cells, common areas, and yard. Every piece of evidence was examined and all leads were followed. Staff were also sharing the information uncovered with staff at CDCR headquarters and other institutions in order to determine if this was a statewide conspiracy to attack staff. Reports had to be completed. As the investigations were progressing, and inmates were being identified as posing threats to the security of the prison, those inmates had to be transported to other prisons. This process also took time. DUF # 96. Plaintiff raises an issue with respect to the declaration that inmates had to be transported to other prisons, maintaining that no general population B-Facility inmates had to be transported to other prisons, and defendants do no [sic] meet their initial burden by making a statement even in the form of a declaration without showing any specific record of this having occurred. As to that point, this fact is disputed.

The main priority for prison officials was maintaining the safety and security of the institution. The goal was to resume normal programing as quickly as possible while ensuring that staff and inmates were safe from further acts of violence. DUF # 97. Additionally, while staff were investigating the attacks on staff and working toward the goal of unlocking the

facility, there continued to be other incidents of violence among inmates, often involving the use of inmate manufactured weapons, delaying the prison's goal of resuming a full normal program. DUF # 98. Staff were faced with a very serious and volatile situation. Staff members were being attacked and inmates continued their racial and/or gang related wars at every opportunity. The safety risk was one of the highest defendant Pliler had seen in her long career with CDCR. DUF # 99. At the onset of the various lockdowns, the inmates could not have outdoor exercise because of the risk of renewed violence and injuries. Identification and removal of those inmates involved in both the staff assaults and the racial and gang related wars, before permitting inmates to congregate was the surest way to reduce the changes for renewed violence against staff and inmates. DUF # 100. As a result, inmates were not permitted outdoor exercise in the main yard, the small yards, or in any other area of CSP-Sac, because the risk of violence and injury was too great. As the investigations progressed, however, and it was determined that it was safe, prison officials started by allowing small groups of inmates to the yard. DUF # 101. Plaintiff points to a May 14, 2003, memorandum that permitted normal yard programming for Asians, American Indians, and Others; concrete yard for Southern Hispanics; and, as of May 15, 2003, concrete yard for black inmates. Opp., Ex. 24, p. 15. The memorandum notes, inter alia, that there had been two stabbing assaults nine days earlier involving white inmates. Plaintiff cites this as evidence that

prison officials know that violence involving particular individuals or a particular race or ethnic group does not require a lockdown of all inmates, even for recent violent acts. Plaintiff raises an issue of fact as to defendants' representation that an extended lockdown depriving all inmates of physical exercise is called for when there is violence within identifiable groups.

The main yard in Facility B, which included a running area, and volleyball and basketball courts was the only feasible place for inmates to go for outdoor exercise and recreation. DUF # 102. This is a point of dispute because, as plaintiff points out, there would be no point in allowing inmates access to the mini-yards for outdoor physical exercise, as the prison evidently does, if doing so were not feasible.

It is CDCR's policy to program inmates of different racial and ethnic groups together. Provided that the inmates fomenting violence are identified and removed from the general population, a single yard program for all inmates created a safer environment for all involved by reducing perceived differences between the different racial and ethnic groups and the hostilities that arose from such perceptions. Integrated outdoor exercise also minimized the changes of releasing an inmate to a hostile yard, or other program facility, e.g., classrooms, work locations, etc., where he could be attacked. DUF # 103.

In DUF # 104, defendants aver that the four separate violent incidents involving attempts to murder staff, combined with numerous incidents of violence between inmates, all with use of inmate manufactured weapons, led to officials' conclusion that yard-release was not safe. In DUF # 105, defendant Pliler maintains that she approved of the use of one or more of the small yards within the main yards of CSP-Sac as areas for inmates to exercise in modified programs, but that this alternative is not always feasible.

In DUF # 106, defendants reiterate that the four incidents required investigation into the causes and circumstances of the incidents before safely releasing inmates but without identifying the information which was obtained which ultimately determined release was appropriate when it was finally allowed. In DUF # 107 and # 108, defendants maintain that the unlocking process for a facility following a lockdown is time consuming, that returning to full normal program quickly is a goal but the priority is staff and inmate safety; and that all CDCR policies and procedures were followed in deciding to implement the lockdowns at issue herein.

Discussion

Defendants move for summary judgment as to plaintiff's Eighth Amendment deprivation of physical exercise claim on grounds that they are entitled to qualified immunity. Accordingly, the court begins the

qualified immunity analysis by determining whether defendants violated plaintiff's constitutional rights.

The deprivation of outdoor exercise by prison officials to prisoners can constitute cruel and unusual punishment in violation of the Eighth Amendment. *Spain v. Procunier,* 600 F.2d 189 (9th Cir. 1979). "[S]ome form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Id.* at 199. The longterm deprivation of outdoor exercise is a denial of a basic need in violation of the Eighth Amendment. *Allen v. Sakai,* 48 F.3d 1082, 1087-1088 (9th Cir. 1994); *see also, Keenan v. Hall,* 83 F.3d 1083, 1090 (9th Cir. 1996) (defendants not entitled to summary judgment where plaintiff produced evidence showing deprivation of outdoor exercise for six-month period in administrative segregation). Regular outdoor exercise is necessary "unless inclement weather, unusual circumstances, or disciplinary needs ma[k]e that impossible." *Spain, supra,* at 199. In *Hayward v. Procunier,* 629 F.2d 599, 603 (9th Cir. 1980), the Ninth Circuit found that the deprivation of outdoor exercise and a five-month lockdown in response to a genuine emergency did not violate the Eighth Amendment; however, plaintiffs therein "were allowed approximately the minimum exercise mandated in

Spain within a month after imposition of the lockdown."[7]

The court will separately analyze each of the at-issue lockdowns. Plaintiff was first on lockdown and denied outdoor exercise from January 4, 2002, to April 3, 2002, i.e., for approximately three months. The attempted murder of Officer Haggard and the attack on the other prison staff by a total of eleven inmates, on January 4, 2002, justify the initial decision to impose the lockdown. It is undisputed that following this incident, searches and interviews of inmates were conducted. However, the record contains no specific evidence regarding why it was determined that the emergency which justified the lockdown in the first place no longer existed on April 3, 2002, as opposed to March 3, for example. Rather, the undisputed facts only generally provide that interviews and searches occurred. Because defendants have not provided evidence specifically demonstrating that the security emergency existed until April 3, 2002, the court does not find that they have met their initial burden of demonstrating the absence of a genuine issue as to this material fact. To hold to the contrary would be to endorse a blank check with respect to time for which exercise is deprived, i.e.,

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[7] The Ninth Circuit in *Spain* required at least one hour of outdoor exercise per day, five days a week, in the absence of, as noted "inclement weather, unusual circumstances, or disciplinary needs" rendering it "impossible." *Hayward, supra,* at 603, citing *Spain, supra.*

"investigation continues" would sanction whatever period prison officials in their unfettered discretion would choose.

Plaintiff was on lockdown next from May 8, 2002, to July 31, 2002, i.e., for almost three months. The attack on Officer Tuter and the previous incidents of violence in B-Facility justified the initial decision to impose the lockdown. Again, it is undisputed that following the attack on Officer Tuter searches and interviews of inmates were conducted. However, the record contains no specific evidence regarding why it was determined that the emergency which justified the lockdown in the first place no longer existed on July 31, 2002, when African American inmates were released to small concrete yards. Because defendants have not provided evidence specifically demonstrating that the security emergency existed until July 31, 2002, the court does not find that they have met their initial burden of demonstrating the absence of a genuine issue as to this material fact.

Thereafter, plaintiff was on lockdown from December 28, 2002, to May 15, 2003, i.e. approximately 4 ½ months.[8] The December 28, 2002, riot clearly justified the initial decision to impose the lockdown. Again, it is undisputed that following the riot,

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[8] Although plaintiff maintains in his second amended complaint that he was on lockdown until June 1, 2003, evidence that he himself submits with his opposition indicates that he at least had some mini-concrete yard access as of May 15, 2003.

searches and interviews of inmates were conducted. However, the record contains no specific evidence regarding why it was determined that the emergency which justified the lockdown in the first place no longer existed on May 15, 2003, when African American inmates were allowed to use small concrete yards. In other words, the record contains no specific evidence regarding why African American inmates were not permitted outdoor exercise sooner. Because defendants have not provided evidence specifically demonstrating that the security emergency existed until May 15, 2003, the court does not find that they have met their initial burden of demonstrating the absence of a genuine issue as to this material fact.

Finally, for the two-month period, from September 3, 2003, until November 4, 2003, while the attack on Officer Curry justified the initial lockdown decision, defendants simply do not provide adequate specific relevant evidence. Again, it is undisputed that following the attack, searches and interviews of inmates were conducted. However, the record contains no specific evidence regarding why it was determined that the emergency which justified the lockdown in the first place no longer existed on November 4, 2003. Because defendants have not provided evidence specifically demonstrating that the security emergency existed until November 4, 2003, the court finds that defendants have not met their initial burden of demonstrating the absence of a genuine issue of material fact.

As discussed above, defendants have not demonstrated that they did not violate plaintiff's constitutional rights. Assuming that defendants violated plaintiff's constitutional rights by depriving him of outdoor exercise for the periods of time discussed above, the next step of the qualified immunity analysis is to determine whether plaintiff's right to exercise was clearly established and whether a reasonable prison official would have understood that to deprive him of exercise was unconstitutional.

At the time of the alleged deprivations, it was clearly established that inmates had a constitutional right to outdoor exercise. *Spain v. Procunier,* 600 F.2d 198 (9th Cir. 1979). It was also clearly established that denying inmates outdoor exercise for the times at issue in this action was constitutional if a genuine emergency existed. *Hayward v. Procunier,* 629 F.2d 599 (9th Cir. 1980).

The issue is whether a reasonable prison official would have understood that depriving plaintiff of outdoor exercise during the at-issue times violated his constitutional rights. As discussed above, the record as to all four lockdowns is not clear as to when the emergency ceased to exist. While it is clear that investigations had to be conducted, the record contains no specific evidence regarding how and when it was determined that it was safe to release African American inmates to the exercise yards. Although plaintiff does not frame an equal protection claim, the record should also contain evidence regarding why African American inmates were released to the

exercise yards after inmates of other races, at least with respect to the May 8, 2002, and December 28, 2002, and September 3, 2003, lockdowns. Without this information, the court cannot determine whether a reasonable officer would have known that denying plaintiff outdoor exercise was unconstitutional. Accordingly, defendants are not entitled summary judgment based on qualified immunity as to plaintiff's Eighth Amendment claim alleging a denial of outdoor exercise.

Accordingly, IT IS HEREBY RECOMMENDED that plaintiff's claims for injunctive relief be found mooted and judgment be entered for defendants as to those claims, and that defendants' March 23, 2006, motion for summary judgment be denied as to plaintiff's claim for money damages with respect to his allegations of Eighth Amendment violations during the four lockdown periods involving a deprivation of outdoor exercise.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive

the right to appeal the District Court's order. *Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: 3/5/07

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY LYNN NORWOOD,

Plaintiff,

vs.

EDWARD ALAMEIDA, JR., et al.,

Defendants. /

2:03-cv-2554-GEB-GGH-P

ORDER

(Filed Mar. 30, 2007)

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On March 5, 2007, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Neither party has filed objections to the findings and recommendations.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed March 5, 2007, are adopted in full;

2. Plaintiff's claims for injunctive relief are mooted by summary judgment which is entered for defendants on those claims; and

3. Defendants' March 23, 2006, motion for summary judgment on plaintiff's damage claim that his Eighth Amendment rights were violated when he was deprived of outdoor exercise during the four lockdown periods is denied.

Dated: March 29, 2007

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE GARLAND E. BURRELL, JR., CHIEF JUDGE

GREGORY LYNN NORWOOD,

Plaintiff,

vs.

No. Civ. S-03-2554

EDWARD ALAMEIDA, et al.,

Defendants.
/

REPORTER'S TRANSCRIPT

JURY TRIAL

WEDNESDAY, NOVEMBER 7, 2007

TIIURSDAY, NOVEMBER 8, 2007

Reported by: KIMBERLY M. BENNETT, CSR # 8958
RPR, CPR, RMR

* * *

[873] You should decide the case as to each defendant separately.

The following facts are undisputed. You should therefore treat these facts as having been proved.

Plaintiff is a prisoner in the custody of the California Department of Corrections and Rehabilitation.

Each defendant was employed at California State Prison-Sacramento during a period of time about which plaintiff complains.

Plaintiff was incarcerated at California State Prison-Sacramento during the period of July 1995 to November of 2005, and was housed in B facility.

During a lockdown, all inmates are confined to their cells and fed there, not allowed to go to assigned work or [874] education programs and all such programs, yard recreation; law library; religious services; regular visiting; canteen and telephone privileges, are suspended. Exit for controlled showers is allowed; essential services are provided, such as medical attention.

Between January 2002 through September 2003, there were four serious inmate assaults on staff in B facility involving the use of inmate-manufactured weapons. Following each incident, the decision was made to place the facility on lockdown.

As a result of the lockdowns, plaintiff was deprived of outdoor exercise from January 4, 2002 until March 27, 2002; from May 8, 2002 until July 31, 2002; from December 28, 2002 until May 15, 2003; and from September 3, 2003 until November 4, 2003.

Plaintiff alleges each defendant violated his Eighth Amendment constitutional right to be free

from cruel and unusual punishment by denying him outdoor exercise. It is recognized that some form of regular outdoor exercise is extremely important to the psychological and physical well-being of inmates. Such exercise must be provided unless inclement weather, unusual circumstances, or disciplinary needs makes that impossible.

This Eighth Amendment claim has an objective and a subjective component. The objective component is satisfied [875] since it is undisputed that plaintiff was deprived of outdoor exercise for four periods of time ranging from two months to five month [sic] and a half months – that's from two months to five and a half months: Specifically, from January 4, 2002 until March 27, 2002; from May 8, 2002 until July 31, 2002; from December 28, 2002 until May 15, 2003; and from September 3, 2003 until November 4, 2003, but a factual issue remains whether a defendant or defendants is or are liable for depriving plaintiff of outdoor exercise during one or all of those time periods. The trial concerns this aspect of the objective component and the subjective component.

To succeed on the subjective component of his claim, plaintiff must prove each of the following elements by a preponderance of the evidence:

First, that defendant was deliberately indifferent to plaintiff's need of outdoor exercise.

And second, defendants' conduct was the legal cause of a harm plaintiff suffered.

Proof by a preponderance of the evidence means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

To establish deliberate indifference, plaintiff must prove defendant knew that plaintiff faced a substantial risk [876] of serious harm to his health or safety and disregarded that risk by failing to take reasonable measures to correct it, Under the deliberate indifference standard, defendant must have been aware of facts from which the inference could be drawn that a substantial risk of serious harm to plaintiff's health or safety existed due to deprivation of outdoor exercise, and defendant must also have drawn that inference.

A defendant who actually knew of a substantial risk of a serious harm to plaintiff's health or safety may be found free from liability if he responded reasonably to the risk, even if the harm was not ultimately averted.

The law defines legal cause in its own particular way. Harm is legally caused by an act, or failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in causing the harm, and that the harm was either a direct result or a reasonably probable consequence of the act or omission.

I am required to instruct you about the measure of damages. By instructing you on damages, I do not mean to suggest for which party your verdict should be rendered.

If you find for plaintiff, you must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate plaintiff for any harm you find was caused by a [877] defendant. You should consider the nature and extent of the harm.

It is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

The law which applies to this case authorizes an award of nominal damages. If you find for plaintiff but you find that plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed $1.

If you find for plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award

punitive damages only if you find that a defendant's conduct was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to plaintiff's safety, rights, or a defendant acts in the face of a perceived risk [878] that his or her action will violate plaintiff's rights under federal law.

That says "under federal law," that should read "under the Eighth Amendment." Do you agree?

MR. SOBOLEWSKI: Yes, Your Honor.

THE COURT: Okay. If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes, but should not reflect bias, prejudice, or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of a defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on plaintiff.

No federal civil rights action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury while in custody without a prior showing of some physical injury.

Plaintiff must establish a physical injury in order to recover compensatory damages for mental or emotional injuries.

The physical injury need not be – I'm going to start that again.

The physical injury need not be significant but must be more than a minor injury which is considered de minimus or [879] trivial.

No physical injury needs to be shown in order for plaintiff to recover nominal and/or punitive damages.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY LYNN NORWOOD, Plaintiff, v. EDWARD ALAMEIDA, JR., et al., Defendants.	2:03-cv-2554-GEB-GGH-P VERDICT FORM (Filed Nov. 9, 2007)

We the jury find the following verdict:

CLAIM ONE

QUESTION 1:

Do you find by a preponderance of the evidence that Defendant Vance violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between January 4, 2002 and March 27, 2002?

YES ✓
NO ____

QUESTION 2:

Do you find by a preponderance of the evidence that Defendant Pliler violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between January 4, 2002 and March 27, 2002?

YES ✓
NO ____

QUESTION 3:

Do you find by a preponderance of the evidence that Defendant Goughnour violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between January 4, 2002 and March 27, 2002?

YES ✓

NO _____

If your answer is "No" to question number 1, 2, and 3, please proceed to question number 7. If your answer is "Yes" to question number 1, 2, or 3, please proceed to question number 4.

QUESTION 4:

What sum of money do you find by the preponderance of the evidence would reasonably compensate Plaintiff for the harm you find was legally caused by Defendants Vance, Pliler, and/or Goughnour in depriving him of outdoor exercise between January 4, 2002 and March 27, 2002?

Defendant Vance $ 0

Defendant Pliler $ 0

Defendant Goughnour $ 0

If your answer to question number 4 did not award any damages to Plaintiff (as to one or more of the Defendants), please proceed to question number 5

and respond as to those Defendants that are not required to pay compensatory damages under question number 4. If your answer to question number 4 did award damages to Plaintiff as to all Defendants, please proceed to question number 6.

QUESTION 5:

What sum of money do you award Plaintiff, not to exceed one dollar?

Defendant Vance	$ 1
Defendant Pliler	$ 1
Defendant Goughnour	$ 1

Please proceed to question number 6.

QUESTION 6:

What sum of money do you find by a preponderance of the evidence that Plaintiff is entitled to recover in punitive damages from each of the Defendants?

Defendant Vance	$ 2,500
Defendant Pliler	$ 2,500
Defendant Goughnour	$ 2,500

Please proceed to question number 7.

CLAIM TWO

QUESTION 7:

Do you find by a preponderance of the evidence that Defendant Goughnour violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between May 8, 2002 and July 31, 2002?

YES ✓

NO _____

QUESTION 8:

Do you find by a preponderance of the evidence that Defendant Vance violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between May 8, 2002 and July 31, 2002?

YES ✓

NO _____

QUESTION 9:

Do you find by a preponderance of the evidence that Defendant Pliler violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between May 8, 2002 and July 31, 2002?

YES ✓

NO _____

If your answer is "No" to question number 7, 8, and 9, please proceed to question number 13. If your answer is "Yes" to question number 7, 8, or 9, please proceed to question number 10.

QUESTION 10:

What sum of money do you find by the preponderance of the evidence would reasonably compensate Plaintiff for the harm you find was legally caused by Defendants Goughnour, Vance, and/or Pliler in depriving him of outdoor exercise between May 8, 2002 and July 31, 2002?

Defendant Goughnour	$	0
Defendant Vance	$	0
Defendant Pliler	$	0

If your answer to question number 10 did not award any damages to Plaintiff (as to one or more of the Defendants), please proceed to question number 11 and respond as to those Defendants that are not required to pay compensatory damages under question number 10. If your answer above did award damages to Plaintiff as to all Defendants please proceed to question number 12.

QUESTION 11:

What sum of money do you award Plaintiff, not to exceed one dollar?

Defendant Goughnour	$	1
Defendant Vance	$	1
Defendant Pliler	$	1

Please proceed to question number 12.

QUESTION 12:

What sum of money do you find by a preponderance of the evidence that Plaintiff is entitled to recover in punitive damages from each of the Defendants?

Defendant Goughnour	$	3,000
Defendant Vance	$	3,000
Defendant Pliler	$	4,500

Please proceed to question number 13.

CLAIM THREE

QUESTION 13:

Do you find by a preponderance of the evidence that Defendant Vance violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between December 28, 2002 and May 15, 2003?

YES	✓
NO	

QUESTION 14:

Do you find by a preponderance of the evidence that Defendant Pliler violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between December 28, 2002 and May 15, 2003?

YES ✓

NO _____

If your answer is "No" to question number 13 and 14, please proceed to question number 18. If your answer is "Yes" to question number 13 or 14, please proceed to question number 15.

QUESTION 15:

What sum of money do you find by the preponderance of the evidence would reasonably compensate Plaintiff for the harm you find was legally caused by Defendants Vance and/or Pliler in depriving him of outdoor exercise between December 28, 2002 and May 15, 2003?

Defendant Vance $ 0

Defendant Pliler $ 0

If your answer to question number 15 did not award any damages to Plaintiff (as to one or both of the Defendants), please proceed to question number 16 and respond as to those Defendants that are not required to pay compensatory damages under question number 15. If your answer above did award

damages to Plaintiff as to both Defendants, please proceed to question number 17.

QUESTION 16:

What sum of money do you award Plaintiff, not to exceed one dollar?

Defendant Vance	$ 1
Defendant Pliler	$ 1

Please proceed to question number 17.

QUESTION 17:

What sum of money do you find by a preponderance of the evidence that Plaintiff is entitled to recover in punitive damages from each of the Defendants?

Defendant Vance	$ 6,000
Defendant Pliler	$ 9,000

Please proceed to question number 18.

CLAIM FOUR

QUESTION 18:

Do you find by a preponderance of the evidence that Defendant Willey violated Plaintiff's Eighth Amendment constitutional right by depriving him of

outdoor exercise between September 3, 2003 and November 4, 2003?

YES ✓

NO _____

QUESTION 19:

Do you find by a preponderance of the evidence that Defendant Walker violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between September 3, 2003 and November 4, 2003?

YES ✓

NO _____

QUESTION 20:

Do you find by a preponderance of the evidence that Defendant Knowles violated Plaintiff's Eighth Amendment constitutional right by depriving him of outdoor exercise between September 3, 2003 and November 4, 2003?

YES ✓

NO _____

If your answer is "No" to question number 18, 19, and 20, the foreperson should sign and date this form. If your answer is "Yes" to question number 18, 19, or 20, please proceed to question number 21.

QUESTION 21:

What sum of money do you find by the preponderance of the evidence would reasonably compensate Plaintiff for the harm you find was legally caused by Defendants Willey, Walker, and/or Knowles in depriving him of outdoor exercise between September 3, 2003 and November 4, 2003?

Defendant Willey	$ 0
Defendant Walker	$ 0
Defendant Knowles	$ 0

If your answer to question number 21 did not award any damages to Plaintiff (as to one or more of the Defendants), please proceed to question number 22 and respond as to those Defendants that are not required to pay compensatory damages under question number 21. If your answer above did award damages to Plaintiff as to all Defendants, please proceed to question number 23.

QUESTION 22:

What sum of money do you award Plaintiff, not to exceed one dollar?

Defendant Willey	$ 1
Defendant Walker	$ 1
Defendant Knowles	$ 1

Please proceed to question number 23.

QUESTION 23:

What sum of money do you find by a preponderance of the evidence that Plaintiff is entitled to recover in punitive damages from each of the Defendants?

Defendant Willey	$ 1,500
Defendant Walker	$ 1,500
Defendant Knowles	$ 3,000

SO SAY WE ALL.

Date: 11/8/07 By /s/ [Illegible]
Foreperson